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BEFORE THE ARIZONA CORPORATION COMMISSION

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BOB STUMP

IN THE MATTER OF THE APPLICATION OF BROADVOX-CLEC, LLC FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS SERVICES WITHIN THE STATE OF ARIZONA.	Docket No. T-20666A-09-0173 **NOTICE OF FILING LATE-FILED EXHIBITS**

Broadvox-CLEC, LLC ("Applicant"), respectfully submits the attached late-filed exhibits, as directed by the Administrative Law Judge at the conclusion of the hearing. The exhibits are filings made in *Qwest Corp. v. Anovian et al.,* United States District Court, Western District of Washington, Case No. 2:08-cv-01715-RSM (the "Washington case"). The Washington case is strikingly similar to *Qwest Corp. v. Broadvox, Inc. et al*, United States District Court, Northern District of Texas, Case No. 4:10-CV-134-A (the "Texas case"). Documents from the Texas case have already been admitted into the record, as follows:

Document	**Exhibit Number**
Qwest First Amended Complaint	S-1, Attachment B
Defendants' Motion to Dismiss (or stay)	A-7
Qwest Response to Motion to Dismiss	A-8
Defendants' Reply to Motion to Dismiss	A-9

The late-filed exhibits from the Washington case are listed below. For ease of reference, the Exhibit numbers continue the sequence used at the hearing. In some cases, voluminous attachments were omitted.

Document	Exhibit Number
Complaint	A-10
Broadvox Motion to Dismiss	A-11
Transcom Motion to Dismiss	A-12
Unipoint Motion to Dismiss	A-13
Qwest Consolidated Opposition to Motions to Dismiss	A-14
Broadvox Reply in support of Motion to Dismiss	A-15
Transcom Reply in support of Motion to Dismiss	A-16
Unipoint Reply in support of Motion to Dismiss	A-17
Order granting Broadvox Motion to Dismiss	A-18
Order granting Transcom Motion to Dismiss	A-19
Order granting Unipoint Motion to Dismiss	A-20
Judgment (Broadvox & Transcom)	A-21
9th Circuit Mandate (Broadvox & Transcom)	A-22
Revised Stipulated Order to Dismiss (Unipoint)	A-23

As these documents demonstrate, the claims Qwest Corporation asserts in the Texas case are identical to the claims Qwest Corporation unsuccessfully asserted in the Washington case. Qwest's complaint (Ex. A-10) in the Washington case asserts nearly identical claims to Qwest's complaint (Attachment B to Ex. S-1) in the Texas case.

The essentially identical nature of these two cases is significant because Qwest's Washington case was dismissed on both jurisdictional and substantive grounds. The Broadvox and Transcom defendants were dismissed on jurisdictional grounds, for lack of personal jurisdiction in Washington over those defendants. (Ex. A-18, A-19, A-22, A-23). However, the Unipoint defendants were dismissed on substantive grounds. (Ex. A-20). Unipoint's Motion to Dismiss and Reply (Ex. A-13 & A-17) are very similar to Broadvox's Motion to Dismiss and Reply in the Texas case (Ex. A-7 & A-9). Indeed, Unipoint's motion in Washington and Broadvox's Motion in Texas make the same points – that Qwest has not sufficiently alleged that the defendants are inter-

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exchange carriers (IXCs), that the case should also be dismissed on the filed-rate doctrine, and that if the case is not dismissed for those reasons, it should be dismissed or stayed under the doctrine of primary jurisdiction to allow the FCC to address the issue raised by Qwest. The judge in Washington specifically agreed that Qwest's allegation that the defendant "acted" as an IXC does not state a claim:

> The language of 47 C.F.R. § 69.5(b) does not state that it imposes access charge liability on those who merely "act as" IXCs. The text of the regulation itself states that carrier's carrier charges, also referred to as access charges, "shall be computed and assessed *upon all interexchange carriers* that use local exchange switching facilities for the provision of interstate or foreign telecommunications services" (emphasis added).
>
> Thus, as currently pled, the Complaint fails to assert an essential element of the claim: that UniPoint is an IXC and therefore owes Qwest access charges.[1]

Qwest's Texas complaint suffers from the same flaw, as shown in the Motion to Dismiss of the Broadvox Defendants (Ex. A-7 at 8-11).

In the Washington case, Qwest appealed the dismissal of the Broadvox and Transcom defendants, but Qwest ultimately dropped the appeal (Ex. A-22). Qwest also filed a first amended complaint against Unipoint, but Qwest later voluntarily dismissed that complaint. (Ex. A-23).

Applicant notes that it was not involved in either the Washington case or the Texas case. In addition, based on reports in the trade press, it is Applicant's understanding that Qwest's complaint in Texas (Ex. A-10) is a "cookie-cutter" complaint that Qwest has filed in various other courts against a number of other telecommunications entities, although Applicant is unsure of how many such suits are pending.

Applicant believes that the foregoing is should answer any remaining questions regarding the Texas case. However, if the ALJ has further questions, Applicant requests that its general counsel, Alex Gertsburg, Esq., be admitted *Pro Hac Vice* and that a telephonic procedural conference or hearing be scheduled to address any such questions. If such a hearing is scheduled, Applicant will submit an appropriate *Pro Hac Vice* motion in accordance with Arizona rules.

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[1] Ex. A-20 at 4.

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RESPECTFULLY SUBMITTED this 22nd day of September 2010.

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By _____

EXHIBIT

"A-10"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Civil Action No. _____

QWEST CORPORATION,

Plaintiff,

v.

ANOVIAN, INC.; BROADVOX, INC.; BROADVOX, LLC; BROADVOXGO!, LLC; TRANSCOM HOLDINGS, INC.; TRANSCOM ENHANCED SERVICES, INC; MASKINA COMMUNICATIONS, INC. (f/k/a TRANSCOM COMMUNICATIONS, INC.); UNIPOINT HOLDINGS, INC.; UNIPOINT ENHANCED SERVICES, INC. (d/b/a "POINT ONE"), UNIPOINT SERVICES, INC.,

Defendants.

COMPLAINT

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COMES NOW, Plaintiff Qwest Corporation ("Qwest"), by and through its undersigned counsel, and hereby files its Complaint against Defendants Anovian, Inc., Broadvox, Inc., Broadvox, LLC, BroadvoxGo!, LLC, Transcom Holdings, Inc., Transcom Enhanced Services, Inc., Maskina Communications, Inc. (f/k/a Transcom Communications, Inc.), Unipoint Holdings, Inc., Unipoint Enhanced Services, Inc. (d/b/a "Point One"), and Unipoint Service, Inc. and in support thereof alleges as follows:

NATURE OF THE ACTION

1. This case involves Defendants' failure to pay federal and state tariffed and legally-required charges for their use of Qwest's local exchange facilities to complete ordinary long-distance telephone calls in at least five states, including Washington. Defendants route these long-distance telephone calls to Qwest knowing and intending that Qwest will use its local exchange facilities to transport and complete these calls. Defendants have engaged in a fraudulent scheme to attempt to mask the true nature of the long-distance calls that they are routing to Qwest, by causing these calls to be sent to Qwest over facilities that are limited to the exchange of local call traffic with other local exchange carriers, as opposed to long-distance traffic. Despite this misdirection, Qwest has been able to identify that a large number of calls that it is receiving over these facilities provisioned to carry local traffic are actually long-distance calls being routed to Qwest by Defendants, typically through an intermediate local exchange carrier. Qwest has demanded that each of the Defendants pay Qwest the appropriate tariffed charges that govern Qwest's transport and termination of these long-distance calls, and each of the Defendants has refused.

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2. Whenever a person makes a long-distance call to a local telephone customer served by Qwest, that long-distance call is terminated through Qwest's local switches, transport facilities and physical wire connection to its customer's home or business (its "local exchange facilities"). Pursuant to its approved federal and state access tariffs, Qwest is then paid for providing this "access" to the called customer over its local exchange facilities. In order to properly bill Qwest's appropriate terminating access charges to carriers who send Qwest this long-distance traffic for termination, such long-distance calls are supposed to be routed to Qwest over connections dedicated to long-distance traffic, rather than connections generally dedicated and restricted to local traffic.

3. By contrast, Qwest exchanges local calls with other competitive local exchange carriers ("CLECs") over different connections generally dedicated and restricted to local traffic, referred to as Local Interconnection Service ("LIS") trunks. Typically, Qwest exchanges such local traffic with CLECs over these LIS trunks, pursuant to an interconnection agreement between Qwest and the CLEC. The interconnection agreement specifies, and expressly limits, the type of traffic that the CLEC may send to Qwest over these LIS trunks. Specifically, the CLEC is not permitted to send to Qwest long-distance traffic originated by other carriers.

4. Defendants have orchestrated and participated in a fraudulent scheme to avoid Qwest's lawfully tariffed terminating access charges applicable to the long-distance calls that these Defendants carry, by intentionally causing those long-distance calls to be misrouted over CLEC LIS trunks provisioned for the exchange of local traffic. On information and belief, Defendants do so by misrepresenting to a CLEC that these long-distance calls are local calls, and thereby causing the CLEC to send these calls to Qwest over the CLEC's LIS trunk connections

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with Qwest. This makes these long-distance calls appear to be typical local calls forwarded by a CLEC to Qwest for termination to a Qwest customer.

5. In addition, for many of these long-distance calls Defendants change, or cause to be changed, either directly or indirectly, the call record information associated with the long-distance call, providing instead originating call information that makes the call appear to be a local call.

6. Because these calls come to Qwest over LIS trunk facilities provisioned to carry local traffic, and because the original originating call record information has often been altered or augmented, making them appear to Qwest to be local calls, Qwest's systems do not identify them as long-distance calls. Defendants thereby evade payment of the terminating switched access charges applicable to long-distance calls for many millions of calls. This is significant because the charges that Qwest imposes, per its tariffs, to transport and terminate a long-distance call are higher than the charges, if any, that Qwest is entitled to impose to transport and terminate local calls. By making long-distance calls *appear* to be local calls, Defendants unlawfully avoid the appropriate tariffed charges applicable to long-distance traffic.

7. Accordingly, Qwest seeks not only to recover the terminating access charges that Defendants have unlawfully avoided – which Qwest preliminarily estimates to be in excess of $6 million, collectively, not including late fees and interest – but also to enjoin Defendants from further perpetuating this unlawful conduct.

JURISDICTION AND VENUE

8. Because Plaintiff and each Defendant are citizens of diverse states, and because the matter in controversy as to each Defendant exceeds $75,000.00, exclusive of interest and

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costs, this Court has jurisdiction over this action pursuant to 28 U.S.C. §1332.

9. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(1), as Defendants are each residents of this judicial district for purposes of venue, as specified in 28 U.S.C. § 1391(c), because each Defendant is subject to personal jurisdiction in this judicial district. Venue is also proper under 28 U.S.C. § 1391(a)(2), as a substantial part of the events and omissions giving rise to the claims in this Complaint occurred in this judicial district. Each of the Defendants has caused to be terminated substantial long-distance traffic over Qwest's local exchange facilities in Washington without paying terminating access charges, as described herein.

PARTIES

10. Qwest Corporation is a Colorado corporation with its principal place of business in Denver, Colorado. Qwest provides, among other things, local and long-distance telecommunications services in Arizona, Colorado, Iowa, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

11. Anovian, Inc. ("Anovian") is a Texas corporation, with its principal place of business in Austin, Texas. Anovian operates or utilizes facilities that are used in connection with the transmission of long-distance telephone calls that both originate and terminate in the multiple states in which Qwest does business, including Washington.

12. Broadvox, Inc. is an Ohio corporation with its principal place of business in Cleveland, Ohio. Broadvox, LLC is a Delaware limited liability company with its principal place of business in Cleveland, Ohio. BroadvoxGo!, LLC is a Delaware limited liability company with its principal place of business in Cleveland, Ohio. On information and belief,

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with regard to the actions alleged in this Complaint, the Broadvox defendants function as one entity (collectively, "Broadvox"). Broadvox operates or utilizes facilities that are used in connection with the transmission of long-distance telephone calls that both originate and terminate in the multiple states in which Qwest does business, including Washington.

13. Transcom Holdings, Inc., Transcom Enhanced Services, Inc., and Maskina Communications, Inc. (f/k/a Transcom Communications, Inc.) are Texas corporations with their principal place of business in Fort Worth, Texas. Transcom Enhanced Services, Inc. and Transcom Communications, Inc. are wholly owned subsidiaries of Transcom Holdings, Inc. On information and belief, with regard to the actions alleged in this Complaint, the Transcom defendants function as one entity (collectively, "Transcom"). Transcom operates or utilizes facilities that are used in connection with the transmission of long-distance telephone calls that both originate and terminate in the multiple states in which Qwest does business, including Washington.

14. Unipoint Holdings, Inc. is a Delaware corporation with its principal place of business in Austin, Texas. Unipoint Enhanced Services, Inc. (d/b/a "Point One") and Unipoint Services, Inc. are Texas corporations with their principal place of business in Austin, Texas. Unipoint Enhanced Services, Inc. and Unipoint Services, Inc. are wholly owned subsidiaries of Unipoint Holdings, Inc. On information and belief, with regard to the actions alleged in this Complaint, the Unipoint defendants function as one entity (collectively, "Unipoint"). Unipoint operates or utilizes facilities that are used in connection with the transmission of long-distance telephone calls that both originate and terminate in the multiple states in which Qwest does business, including Washington.

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15. Each and every Defendant is a Telecommunications Carrier,[1] subject to the provisions of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (the "Communications Act"), and is subject to the jurisdiction of the FCC and the various state public service commissions ("PSCs").

16. Each and every Defendant participates in the provision of Telephone Toll Service[2] because each and every Defendant participates in the routing of telephone calls between local exchanges originated and terminated on the public switched telephone network ("PSTN").

17. By participating in the provision of Telephone Toll Service, each and every Defendant benefits from Qwest's terminating access services and is obligated to pay for such access services as provided in Qwest's federal and state tariffs.

BACKGROUND

The Access Charge Regime – How It is Supposed to Work

18. In order to understand Defendants' fraudulent scheme, it is necessary to first explain how access charges are normally imposed on long-distance calls, also sometimes referred to as "toll" or "interexchange" calls. When a telephone customer dials a phone number, that call is first handled by the customer's local telephone company ("local exchange carrier" or "LEC"). If the customer is dialing a party outside of his local calling area (the "local exchange" or "exchange"), then a 1+ dialing pattern is typically used, and the call is handed off from the local exchange carrier to the calling party's chosen long-distance carrier, to be forwarded out of the local exchange. This long-distance service is known as "interexchange service," and the

[1] 47 U.S.C. § 153(44).
[2] 47 U.S.C. § 153(48).

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long-distance company is referred to as an "interexchange carrier" or "IXC."[3] Because they participate in the provision of Telephone Toll Service with regard to the calls at issue in this Complaint, each and every Defendant acts as an interexchange carrier with regard to these calls.

19. Once the call is handed from the calling party's local exchange carrier to the originating interexchange carrier, the interexchange carrier then transports the call (or arranges for the transport of the call through one or more intermediate carriers) from the caller's local exchange area to the exchange area of the person called. The called party's local exchange carrier then receives the call from the originating or intermediate interexchange carrier and delivers it (or "terminates" it) to the called party.

20. The transmission of an interexchange call generally requires local exchange carriers to provide two kinds of switched access service: 1) originating switched access service and 2) terminating switched access service. Originating switched access service occurs when a call originates on a local exchange carrier's network and is routed to an interexchange carrier for completion in another local exchange. Terminating switched access service occurs when a carrier routes a long-distance call to the called party's local exchange carrier for termination either directly or through an intermediate carrier. The local exchange carriers impose charges for these services pursuant to federal or state tariffs, depending on whether the call is interstate or intrastate. These switched access charges are typically assessed per minute of use, based on the duration of the call. Switched access charges are designed to recover, at least in part, the costs of using the local exchange carrier's facilities to initiate and complete long-distance calls. In this

[3] *See, e.g.*, 47 C.F.R. § 64.4001 ("The term interexchange carrier means a telephone company that provides telephone toll service. An interexchange carrier does not include commercial mobile radio service providers as defined by federal law.").

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case, it is Qwest's terminating switched access charges that are at issue.

21. A carrier need not have explicitly or directly ordered a local exchange carrier's access services to be responsible for payment of access charges for those services. Under a doctrine known as the Constructive Ordering Doctrine, a carrier that has not explicitly or directly ordered the local exchange carrier's access service is nonetheless held to have constructively ordered the tariffed service and is obligated to pay for the service if: 1) the carrier is interconnected in such a manner that it can expect to receive access services; 2) fails to take reasonable steps to prevent the receipt of access services; and 3) does in fact receive such services. *See In re Access Charge Reform*, FCC Order No. 99-206, 14 F.C.C.R. 14221, ¶ 188 (1999).

Defendants' Evasion of Access Charges

22. Defendants' scheme to avoid paying Qwest's terminating switched access charges is based upon disguising the true nature of the ordinary long-distance calls that they cause to be delivered to Qwest. The calls at issue here originated as ordinary long-distance calls exactly as described in Paragraph 18, *supra*. It is how Defendants cause these long-distance calls to be terminated that allows them to perpetrate their scheme. Specifically, rather than delivering these calls directly to Qwest as long-distance calls, Defendants deliver them instead to an intermediate CLEC by way of a local service designed for exchange of local traffic, typically a primary rate interface ("PRI") service. Defendants purchase this local PRI service from a CLEC, pursuant to the CLEC's tariff or a specific contract with the CLEC. On information and belief, Defendants represent to the CLEC that the calls they will pass to the CLEC under this PRI service are local calls. In turn, the intermediate CLEC then routes the disguised long-distance traffic to Qwest,

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commingled with true local traffic, by way of the LIS trunks that connect the CLEC's local network to Qwest's local network.

23. Passing these long-distance calls to an intermediate CLEC in this fashion also often has the effect of manipulating the call record information associated with the party who initiated the long-distance call, by inserting originating call information associated with the local PRI or other local facility of the intermediate CLEC — typically the local phone number associated with that local facility. This means that, not only is the long-distance call handed to Qwest over a LIS trunk local traffic facility (making it appear to be local traffic), the call now also appears to be a local call based on this inserted originating local phone number and, in some instances, the deletion or alteration of the original phone number information for the party who made the long-distance call. In this fashion, Defendants are further able to effectively disguise this traffic as local traffic, and avoid paying legally required tariffed rates for the termination of long-distance traffic.

24. On the originating side of this traffic flow, Defendants contract with the originating interexchange carrier (or some intermediate interexchange carrier) to transport the long-distance call from that interexchange carrier to the called party's local exchange carrier for termination. In doing this, Defendants often refer to themselves as "Least Cost Routers" ("LCRs"). On information and belief, the Defendants represent to the originating or intermediate interexchange carriers that they can provide long-distance call transport and/or termination at a substantially lower cost than is typically available, thus making these Defendants "Least Cost Routers."

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25. Of course, Defendants are able to route and terminate long-distance traffic at a lower cost primarily, if not entirely, because Defendants' scheme avoids the need to pay legally required terminating access charges for these long-distance calls. Avoiding these terminating access charges means that the aggregate cost to transport and terminate a long-distance call is reduced, and on information and belief, this allows Defendants to pass some portion of these cost savings through to the interexchange carriers who are their customers, in the form of lower cost transport/termination services. The economic viability of Defendants' scheme depends on their routing these calls for termination over Qwest facilities intended for local traffic, rather than over Qwest facilities intended for long-distance traffic, and the associated avoidance of the charges for Qwest's terminating switched access services.

26. For some of this traffic, once a Defendant takes a long-distance call from one of its interexchange carrier customers, that Defendant may convert the call from the ordinary, circuit-switched format to Internet Protocol ("IP") format. This essentially means that the Defendant may transport the call some distance using internet-based packet switches and the internet backbone, rather than utilizing the traditional network of dedicated circuit switches and connecting facilities. If such an IP format conversion takes place, however, the Defendant always converts the call back to the circuit-switched format prior to terminating the call (generally by way of an intermediate CLEC) with Qwest. On information and belief, even if the call is temporarily converted to IP, the Defendant does not add any functionality or enhancement to the call or the transmission of the call from the perspective of the calling or called party. On information and belief, some of these calls are never converted to IP format at all, but remain in circuit switched format for the entire call path.

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27. Additionally, after receiving a long-distance call from one of its interexchange carrier customers, the Defendant typically, either directly or indirectly, modifies the billing information concerning the phone number of the calling party. When initiated, the long-distance call is associated with originating call record information that includes the telephone number of the calling party who initiated the call. This originating call information would readily demonstrate that the call is inbound from another exchange (e.g., based on the 3-digit area code), thereby identifying the call as an interexchange, or long-distance, call. By the time the call reaches Qwest for termination in the terminating local exchange of the called party, however, that originating call record information has changed, making the call appear to be a local call. For many of these calls the Defendant, either directly or indirectly, causes the original originating call record information to be replaced with new information, or causes new call record information to be added to the original call record information, misrepresenting where the call "originated" and thereby disguising the call to appear as a local call. In other words, a long-distance call from an individual in Phoenix, Arizona to an individual in Seattle, Washington, will appear to Qwest, based on the call record information passed to Qwest when it receives the call for termination, to be a local call originated in Seattle rather than a long-distance call originated in Phoenix.

28. On information and belief, Defendants knowingly and intentionally receive ordinary long-distance traffic from interexchange carriers, and knowingly and intentionally hand this long-distance traffic to CLECs, representing it to be local traffic. Defendants do so with the express intent that the CLEC misroute the long-distance traffic as local traffic to Qwest for termination over the local interconnection facilities (LIS trunks) between the CLEC and Qwest.

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Each Defendant is thereby interconnected with Qwest's network such that it understands that Qwest will terminate these long-distance calls by providing Qwest's terminating access services. Each Defendant has failed to take reasonable steps to avoid receiving Qwest's terminating access services, and knows and in fact intends that Qwest will terminate these calls by providing Qwest's terminating access services.

29. By causing long-distance traffic to be sent through local only facilities, however, each Defendant knowingly and intentionally circumvents Qwest's ability to properly identify this traffic as long-distance traffic, and impose appropriate tariffed charges for terminating switched access services. Defendants, by this scheme, have avoided paying terminating switched access charges for long-distance traffic, by disguising the calls as local calls before the calls reach Qwest.

30. By design, Defendants' improper call-termination scheme prevented Qwest from distinguishing between local traffic that was lawfully passed through LIS trunks, and interexchange long-distance traffic that was unlawfully passed through these facilities. Qwest was thus unable to bill for (or, in many cases, even to detect or measure) a great deal of interexchange voice traffic delivered by the Defendants for termination. With regard to the traffic that Qwest was able to identify as inappropriate long-distance traffic being terminated by Defendants over CLEC LIS trunks, Qwest was able to learn the identity of the Defendant responsible for that traffic only from the CLEC sending that traffic to Qwest over its LIS trunk connections with Qwest. On information and belief, the full extent of this long-distance traffic for which Defendants are avoiding Qwest's terminating switched access charges is much greater than what Qwest has been able to discover.

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31. Defendants have each intentionally pursued their improper terminating access charge-avoidance scheme surreptitiously for several years. When Qwest learned of this behavior it demanded that each Defendant make Qwest whole for at least those terminating switched access charges that Qwest was able to determine each Defendant had previously avoided.

32. Qwest has not received payment from any of the Defendants for the overdue terminating switched access charges. On information and belief, each Defendant continues to send Qwest undetected long-distance traffic through intermediate CLECs over CLEC LIS trunks.

Temporary Conversion to IP Format of a Long-Distance Call Does Not Change the Applicability of Terminating Switched Access Charges

33. While Qwest anticipates that some of the Defendants may argue that their use of IP-format to transport some of these ordinary long-distance calls relieves these Defendants of any obligation to pay Qwest's terminating access charges, the FCC has made abundantly clear that is not the case. The Defendants' potential temporary IP format conversion of a long-distance call does not change the nature of that long-distance telephone call, nor does it impact the applicability of Qwest's access tariffs.

34. IP technology is simply the latest in a medley of different transmission technologies used to transport ordinary voice telephone calls, originating on the public, circuit-switched telephone network (PSTN), from one point to another. As the FCC has recognized, however, the choice of transmission technology makes no difference to the regulatory classification of a telephone call or the applicability of access charges. Under the FCC's longstanding rules, when a call begins and ends as an ordinary, circuit-switched telephone call, the technology that telecommunications carriers elect to use to transport the call is irrelevant for purposes of access charges. No matter the technology used, the local exchange facilities are

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utilized in the same manner, and the transport technology is transparent to the end-users.

35. All of the long-distance calls for which Qwest demands that Defendants pay Qwest's tariffed terminating switched access charges, and which are the subject of this Complaint, are ordinary long-distance phone calls that were originated over the public, circuit-switched telephone network, and terminated over the public, circuit-switched telephone network. Qwest's claims in this action are limited to such long-distance calls, which both originate, and terminate, as ordinary circuit-switched telephone calls.

36. A long-distance call, if transported by one of the Defendants using IP protocol, will undergo two protocol changes, from circuit-switched protocol to IP protocol, and from IP protocol back to circuit-switched protocol. In such cases, however, the call undergoes no "net protocol conversion," because the call begins and ends in the same ordinary, circuit-switched format. As discussed herein, the FCC has determined that such long-distance calls that undergo no "net protocol" conversion are subject to terminating access charges.

37. Further, for all of these calls, neither the calling party nor the called party has any idea whether or not their long-distance call has been converted to IP format somewhere in the middle of the transmission path. The call was dialed and received in exactly the same manner as any other long-distance call, and customers receive no added functionality as a result of any potential IP conversion.

38. Further, neither the calling party nor the called party has any idea that one of the Defendants has even been involved in transporting their long-distance call. Therefore, even if some of the Defendants claim to add functionality to the calls that they transport, the calling and called parties have not requested this enhanced functionality, and in fact, have no way of even

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knowing that this purported enhanced functionality is available on their call, or accessing this purported enhanced functionality.

39. In the end, the Defendants' service, whether or not an IP conversion takes place in the middle of the call, makes the exact same use of, and imposes precisely the same burden on, Qwest's local exchange facilities for terminating the call as does an ordinary circuit-switched long-distance call.

The FCC Has Held that Phone-to-Phone IP Telephony Services Are Subject to Terminating Switched Access Charges

40. In 2004, the FCC issued an Order holding that long-distance telephone calls are subject to terminating switched access charges, even if the call undergoes a temporary IP format conversion. *In the Matter of the Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, FCC Order No. 04-97, 19 F.C.C.R. 7457 (Docket No. 02-361, April 21, 2004), *available at* 2004 WL 856557 (the "FCC Order").

41. The FCC determined that, when an interexchange service "(1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology," the service provider is liable for terminating access charges. *FCC Order* at 7457-58, ¶ 1.

42. Furthermore, the FCC held: "Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport." *Id.* at 7470, ¶ 19.

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43. Here, to the extent that the Defendants are using IP transport, their services fit squarely within the criteria laid out by the FCC for terminating switched access charges to apply. First, in the long-distance calls at issue here, for which Qwest seeks payment of terminating switched access charges from Defendants, the calling and called parties use ordinary customer premises equipment. Second, these calls originate and terminate on the PSTN. Lastly, these calls undergo no net protocol conversion, and the Defendants provide no enhanced functionality from the perspective of the end-users, who have not requested, nor are they even aware, of any purported enhanced functionality provided by Defendants.

44. The FCC has settled the law regarding the applicability of terminating switched access charges to long-distance calls of this type, involving IP transport but no net protocol conversion or enhanced functionality, ordering that access charges apply, and plainly stating that local exchange carriers, such as Qwest here, should pursue civil actions to collect the unpaid terminating switched access charges. *See id.* at 7472 ¶ 23, n.93 ("[T]he Commission does not act as a collection agent for carriers . . . . Therefore, we expect that LECs will file any claims for recovery of unpaid access charges in state or federal courts, as appropriate."). The FCC further stated that access charges "should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LEC, unless the terms of any relevant contracts or tariffs provide otherwise." *Id.* at ¶ 23, n. 92.

COUNT I (Against All Defendants)
(NON-PAYMENT OF FEDERALLY TARIFFED ACCESS CHARGES)

45. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 44 of this Complaint.

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46. Qwest's interstate terminating switched access charges for long-distance calls for interstate long-distance calls are set forth in Qwest's FCC Tariff No. 1.

47. Under the terms of Qwest's federal tariff, the Defendants are obligated to pay Qwest's terminating switched access charges because each of the Defendants knowingly and intentionally sent interstate long-distance traffic to Qwest for termination in numerous Qwest states, including at least Washington, Arizona, Idaho, Oregon, and Utah.

48. Qwest's federal tariff also applies to the long-distance calls that the Defendants caused to be routed to Qwest for termination pursuant to the Constructive Ordering Doctrine. The Defendants interconnected in such a manner that they expected to receive interstate terminating access service, they failed to take steps to prevent the receipt of such service, and they did in fact receive such service.

49. Qwest fully performed its obligations under its federal tariffs.

50. Qwest has demanded, and the Defendants have each refused to pay the terminating switched access charges required by Qwest's federal tariffs.

51. Defendants materially violated Qwest's federal tariffs by failing to pay the tariffed rates for the services they received.

52. Qwest has been damaged in an amount to be determined at trial.

WHEREFORE, Qwest prays for relief as hereinafter set forth.

COUNT II (Against All Defendants)
(NON-PAYMENT OF STATE TARIFFED ACCESS CHARGES)

53. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 52 of this Complaint.

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54. Qwest's intrastate terminating switched access charges are set forth in state tariffs, schedules, catalogs or price lists on file at the public utility/service commissions in Arizona, Colorado, Iowa, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

55. Under the terms of each of Qwest's state tariffs, the Defendants are obligated to pay Qwest's terminating switched access charges because each of the Defendants knowingly and intentionally sent intrastate long-distance traffic to Qwest for termination in numerous Qwest states, including at least Washington, Arizona, Idaho, Oregon, and Utah.

56. Qwest's various state tariffs also apply to the long-distance calls that the Defendants caused to be routed to Qwest for termination pursuant to the Constructive Ordering Doctrine. The Defendants interconnected in such a manner that they expected to receive intrastate terminating switched access service, they failed to take steps to prevent the receipt of such service, and they did in fact receive such service.

57. Qwest fully performed its obligations under its various state tariffs.

58. Qwest has demanded, and the Defendants have each refused to pay the terminating switched access charges required by Qwest's various state tariffs.

59. Defendants materially violated Qwest's various state tariffs by failing to pay the tariffed rates for the services they received.

60. Qwest has been damaged in an amount to be determined at trial.

WHEREFORE, Qwest prays for relief as hereinafter set forth.

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COUNT III (In the Alternative) (Against All Defendants)
(UNJUST ENRICHMENT)

61. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 60 of this Complaint.

62. For the reasons set forth above and in the *FCC Order*, pursuant to Qwest's federal and state tariffs, Defendants are liable to Qwest for their failure to pay interstate and intrastate terminating switched access charges on long-distance traffic that Defendants caused to be delivered to Qwest for termination.

63. By terminating the long-distance calls carried by Defendants to Qwest's local telephone customers, Qwest conferred a benefit on Defendants. The Defendants caused this long-distance traffic to be misrouted and terminated by Qwest at the substantially lower termination rate charged for local traffic.

64. Defendants understood that the termination of long-distance calls by Qwest was important to Defendants' customers, and they accordingly appreciated and recognized that Qwest's termination of long-distance calls was a benefit to them.

65. Defendants have accepted and retained the benefit of Qwest's terminating switched access services.

66. Defendants have not provided appropriate compensation to Qwest for having terminated the calls.

67. By accepting and retaining the benefit of Qwest's terminating switched access services without appropriately compensating Qwest, Defendants have been unjustly enriched in an amount to be determined at trial.

WHEREFORE, Qwest prays for relief as hereinafter set forth.

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COUNT IV (In the Alternative) (Against All Defendants)
(TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONSHIP OR BUSINESS EXPECTANCY)

68. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 67 of this Complaint.

69. When Qwest terminates long-distance calls using its local exchange facilities, Qwest, pursuant to its federal tariffs and its various state tariffs, is entitled to be paid its terminating switched access charges. Qwest's tariffs establish a contract between Qwest and its customers, including carriers who terminate long-distance calls using Qwest's local exchange facilities. Qwest has a valid business expectancy that it will be paid its federal and state tariffed charges for providing terminating switched access when it, in fact, provides such terminating switched access.

70. To the extent that any of the Defendants maintain that their interexchange carrier customers, rather than Defendants themselves, are the parties liable to Qwest for terminating switched access charges pursuant to Qwest's federal and state tariffs, and to the extent that Defendants are not found to be directly liable to Qwest for the payment of Qwest's tariffed terminating switched access charges, it is Defendants' actions that interfered with Qwest's contractual relationships and/or business expectancy with these other interexchange carriers.

71. But for Defendants' fraudulent scheme and intervention in the normal flow of the long-distance calls that are the subject of this action, the Defendants' interexchange carrier customers would have delivered these calls to Qwest for termination in Qwest's local exchange over facilities utilized for the termination of long-distance traffic.

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72. But for Defendants' fraudulent scheme and intervention in the normal flow of the long-distance calls that are the subject of this action, Qwest would have been able to identify these calls as long-distance calls, and bill the interexchange carriers passing these calls to Qwest the appropriate tariffed terminating switched access charges.

73. Defendants each had knowledge of Qwest's relationships with the various interexchange carriers whose business each of the Defendants courted.

74. Defendants each had knowledge of the access charge regime, and how that regime applies to long-distance calls.

75. Defendants each had knowledge that Qwest maintains both federal and state tariffs setting forth Qwest's terminating switched access charges.

76. Defendants each had knowledge that interexchange carriers handing long-distance calls to Qwest for termination in Qwest's local exchanges pay Qwest these federal and state tariffed terminating switched access charges. In fact, each of the Defendants' business models is *based* on an understanding of these terminating switched access charges, and a fraudulent scheme to terminate long-distance calls for interexchange carriers at a lower cost by *avoiding* these terminating switched access charges.

77. Defendants' fraudulent scheme and intervention in the normal flow of the long-distance calls that are the subject of this action interfered with Qwest's contractual relationship and/or business expectancy with these interexchange carriers.

78. Defendants' interference was intentional, was by design, and caused a breach or termination of Qwest's contractual relationship or expectancy of a contractual relationship with these interexchange carriers.

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79. Defendants' interference was for an improper purpose; namely, Defendants' interference was in furtherance of its fraudulent scheme to provide so called "Least Cost Routing" to interexchange carriers by entirely and illegally circumventing Qwest's federal and state tariffed terminating switched access charges.

80. As a consequence of Defendants' interference, Qwest was damaged, in an amount to be proven at trial, by the interexchange carriers' non-payment of tariffed terminating switched access charges appropriately payable for terminating long-distance calls.

COUNT V (Against All Defendants)
(FRAUD)

81. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 80 of this Complaint.

82. For each long-distance call handed by a Defendant to Qwest for termination, each Defendant has knowingly, and with the intent to defraud, made misrepresentations and omissions of material facts, including (but not limited to):

a. Changing or causing to be changed or augmented, either directly or indirectly, the call record information to falsely indicate that the telephone call originated in the local exchange as a local call, when in fact that call originated in another exchange as a long-distance call, and had been carried to the local exchange as a long-distance call by that Defendant;

b. Not informing Qwest that the telephone call was a long-distance telephone call subject to applicable tariff charges for terminating access services; and

c. Routing the long-distance telephone call, or causing the long-distance call to be routed, over facilities expressly provisioned to carry local traffic, thereby knowingly

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and unlawfully avoiding terminating switched access charges.

83. These misrepresentations and/or omissions were false and misleading at the time they were made.

84. Defendants made each of these misrepresentations and/or omissions with knowledge of their falsity, or recklessly without regard for their truthfulness as a positive assertion, with the intent to deceive Qwest, and with the intent to induce Qwest to terminate the long-distance calls routed to it by a Defendant.

85. Defendants made each of these misrepresentations and/or omissions willfully and wantonly.

86. Qwest was, in fact, deceived by Defendants' misrepresentations and omissions.

87. Qwest reasonably and justifiably relied to its detriment on Defendants' misrepresentations and omissions.

88. Due to Defendants' fraudulent conduct, Qwest was unable to bill for (or, in some cases, even to detect or measure) the long-distance traffic that each Defendant terminated over Qwest's local facilities, either directly or indirectly. Also, Qwest was not able to ascertain the full volume of long-distance traffic that each Defendant was delivering to Qwest for termination without payment of terminating switched access charges. Qwest did demand, but has not received, payment from Defendants for those long-distance calls that Qwest was able to identify as inappropriately being forwarded to Qwest over CLEC LIS trunks, by way of a PRI or other local circuit purchased by a Defendant from a CLEC. Qwest was able to do so, however, only where a CLEC was willing to disclose the identity of the Defendant that was sending long-distance calls to that CLEC in this fashion. Absent such information from a CLEC, Qwest had

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no knowledge as to the involvement of a given Defendant in the call path of these long-distance calls. It is likely that, due to Defendants' subterfuge, there have been many additional long-distance calls that went undetected. The truth about the full scope of each Defendant's unlawful conduct accordingly remains within the particular knowledge of that Defendant, which engaged in deceptive acts calculated to mislead and thereby obtain an unfair advantage.

89. Qwest has been damaged as a direct and proximate result of each Defendant's misrepresentations and omissions in an amount to be determined at trial.

WHEREFORE, Qwest prays for relief as hereinafter set forth.

COUNT VI (Against All Defendants)
(DECLARATORY JUDGMENT)

90. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 89 of this Complaint.

91. Pursuant to F.R.C.P. 57 and 28 U.S.C. § 2201, this Court has the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.

92. The Defendants knowingly and intentionally misroute and disguise long-distance telephone traffic as local traffic to avoid paying applicable terminating switched access charges.

93. For each misrouted long-distance call passed either directly or indirectly from a Defendant to Qwest that is the subject of this Complaint,

a. the calling and called parties use ordinary customer premises equipment,

b. the call originates and terminates on the PSTN,

c. the call undergoes no net protocol conversion, and

d. the Defendant provides no enhanced functionality from the perspective of the end-users.

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94. For the reasons set forth above, the traffic that Defendants cause to be routed to Qwest for termination is subject to the payment of terminating switched access charges, as specified in the *FCC Order*.

95. Qwest has suffered and will continue to suffer damages as a result of the Defendants' scheme and seeks a declaration that, in accordance with the *FCC Order*, and because of the Defendant's willful, intentional, and harmful acts against Qwest, the long-distance traffic that Defendants caused to be routed to Qwest for termination is subject to the terminating switched access charges provided in Qwest's federal and state tariffs.

WHEREFORE, Qwest prays for relief as hereinafter set forth.

PRAYER FOR RELIEF

WHEREFORE, Qwest prays that this Court grant it relief, as follows:

a. A judgment in its favor declaring that the long-distance traffic that Defendants caused to be routed to Qwest for termination is subject to the terminating switched access charges provided in Qwest's federal and state tariffs;

b. Money damages in an amount to be proven at trial, plus all applicable late fees and prejudgment interest;

c. All costs and attorney's fees incurred by Qwest, pursuant to 47 U.S.C. § 206 or as otherwise allowed by law;

d. A declaratory judgment, and permanent injunctive relief, enjoining Defendants from continuing to engage in the conduct alleged herein;

e. A full accounting of the number of long-distance minutes improperly sent to Qwest for termination;

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f. Indemnification for claims that have been or may be asserted and damages that have been or may be sought by third parties arising in whole or in part from Defendants' wrongful conduct; and

g. Such further relief as this Court deems appropriate and just.

Dated this 26th day of November, 2008.

Respectfully submitted,

s/ Douglas N. Owens

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EXHIBIT

"A-11"

HONORABLE RICARDO MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION,

Plaintiff,

v.

ANOVIAN, INC., et al.,

Defendants.

No. 08-CV-01715 MAT

MOTION OF BROADVOX DEFENDANTS (I) TO DISMISS FOR LACK OF PERSONAL JURISDICTION, OR – IN THE ALTERNATIVE – (II) (A) TO STAY PROCEEDINGS UNDER THE DOCTRINE OF PRIMARY JURISDICTION, (B) TO TRANSFER THE CASE TO THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, (C) TO DISMISS THE FRAUD CLAIM FOR LACK OF PARTICULARITY, AND (D) FOR A MORE DEFINITE STATEMENT.

NOTE ON MOTION CALENDAR:
March 6, 2009

Oral Argument Requested

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Cases

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Statutes

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Under Rule 12(b)(2) of the Federal Rules of Civil Procedure ("FRCP"), Defendants Broadvox, Inc., Broadvox, LLC and BroadvoxGo!, LLC (collectively "Broadvox" or " the Broadvox defendants") respectfully move the Court for a dismissal of the claims asserted against them because not one of them is subject to personal jurisdiction within the State of Washington. Alternatively, in the event that Plaintiff Qwest Corporation ("Qwest") can establish that this Court has personal jurisdiction over Broadvox, the Court should apply the doctrine of primary jurisdiction to stay this litigation or transfer it to the Federal Communications Commission ("FCC"), which is uniquely positioned to rule on the technical telecommunications and Voice over Internet Protocol ("VoIP") issues that are at the very heart of this matter. As a second alternative, the Court should transfer the case to the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. §1404(a) because of the strong connection to Dallas that all parties have relative to their tenuous connection to Seattle or Washington. As a third alternative, in the event the Court retains this matter, it should dismiss the fraud claim under FRCP 9(b) because Qwest failed to plead it with the requisite particularity, and should require Qwest under FRCP 12(e) to make a more definite statement as to its entire complaint.

I. INTRODUCTION

A. Procedural History

On November 26, 2008, Qwest filed a complaint with this Court asserting six claims against ten defendants: Count I – Non-Payment of Federally Tariffed Access Charges; Count II – Non-Payment of State Tariffed Access Charges; Count III – Unjust Enrichment; Count IV – Tortious Interference with Contractual Relationship or Business Expectancy; Count V – Fraud; and Count VI – Declaratory Judgment. According to the Complaint, the defendants (which may be divided into five groups – Anovian, Unipoint,

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Maskina, Transcom and Broadvox) are all telecommunications carriers that avoid paying access charges to Qwest by disguising the nature of their long distance traffic to make it look like local traffic. Broadvox will, at the appropriate place and time, demonstrate why the tale that Qwest has woven into its 27-page work of fiction is neither credible nor possible. That place and time is not, however, here and now.

B. Statement Of Relevant Facts

Broadvox LLC was formed in 2001 as a limited liability company under the laws of the State of Delaware. *See* Affidavit of Eugene Blumin, submitted herewith ("Blumin Aff.") at ¶3. Broadvox, Inc. and BroadvoxGo, LLC are later-formed related companies.[1] From their inception through 2007, all three Broadvox companies made their headquarters and principal places of business in Cleveland, Ohio. *Id.* at ¶5. In 2007, the Broadvox defendants moved their headquarters to Dallas, Texas. *Id.* at ¶5.

The Broadvox defendants are communications companies but are not interexchange carriers. *Id.* at ¶6. Broadvox, LLC, solely carries VoIP (Voice over Internet Protocol) traffic for its customers, who are all communications companies and resellers themselves. *Id.* at ¶6. VoIP is the routing of voice communications over the internet. *Id.* at ¶6. None of the Broadvox Defendants accept or forward for termination any circuit switched analog calls, a type of traffic referred to as "ordinary" telephone traffic in Qwest's complaint.[2] *Id.* at ¶6.

Throughout their existence, the Broadvox defendants have never had any employees nor offices in the State of Washington. *Id.* at ¶7. Further, Broadvox has never

[1] As part of a reorganization in 2006, Broadvox, Inc. was formed as an Ohio Corporation and Broadvox, LLC's new parent company. *Id.* at ¶3. BroadvoxGo, LLC was formed in 2007 as a Delaware limited liability company and another subsidiary of Broadvox, Inc. *Id.* at ¶3. BroadvoxGo, LLC sells the VoIP routing service at the retail level to other businesses. *Id.* at ¶6. Broadvox, Inc. is simply a holding company. *Id.* at ¶6.

[2] *See* Complaint ¶34.

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bought nor sold significant communications traffic in this state, nor has it done any significant business, in Washington. *Id.* at ¶8. In 2008, only 0.1051% of all of Broadvox's purchasing was from Washington businesses. *Id.* at ¶9. In 2008, only 0.4189% of all of Broadvox's sales were to Washington businesses. *Id.* at ¶10. Throughout its existence, only .4154% of all purchasing that Broadvox has ever made has been made from Washington businesses, and only .3065% of Broadvox's sales during its entire existence have been to Washington customers. *Id.* at ¶¶11-12. Indeed, Broadvox has had business dealings with hundreds of vendors and customers. Of these, **only eight vendors and seven customers have been located in Washington**. *Id.* at ¶21.[3]

No representative of Broadvox has ever traveled to Washington to discuss or negotiate the terms of any contracts or business dealings. *Id.* at ¶13. The small amounts of sales and purchases made by Broadvox to and from Washington are made by telephone with follow-up by email or facsimile, if necessary. *Id.* at ¶13. Broadvox does not direct any advertising or marketing into Washington. *Id.* at ¶14. It is not now, nor has it ever been, registered or licensed to do business in Washington, nor has it ever been required to do so. *Id.* at 15. Broadvox has never maintained any banking or brokerage accounts in Washington, nor has it ever owned, leased or used, any real estate in Washington; Broadvox does not have, nor has it ever had, an address, post office box, telephone or fax number or listing in Washington. *Id.* at 16-18. Broadvox has not been required to file a tax return in Washington or pay any taxes to the State of Washington. *Id.* at 19.

Broadvox has not brought suit in the courts of Washington, nor has Broadvox participated in any arbitration, administrative or other like hearing in Washington. *Id.* at

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[3] Because the Broadvox defendants are private companies, they will not disclose other amounts of customers or revenues in this public filing. The percentages provided herein should be sufficient to apprise Qwest and the Court of the nominal relationship that Broadvox has within this state. Should additional relevant information be required, Broadvox will disclose it pursuant to a stipulated protective order.

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¶20. The present litigation is the first instance in which Broadvox has been named a party in any proceeding pending in Washington. *Id.*

It is true that Broadvox's customers and end-users may place calls to the state of Washington. Those calls are carried by Broadvox to intermediate carriers who, in turn, hand them off to Qwest's facilities in the state of Washington. But those calls do not create jurisdiction over Broadvox. Callers use Broadvox's facilities to interconnect with all 50 states, as well as South America, Africa, and nearly all of the other continents. Broadvox itself has no control over the destination that a caller may choose for its call, nor does it direct its activities into those states and countries.

II. LAW AND ARGUMENT

A. The Court Should Dismiss The Case Against The Broadvox Defendants Under FRCP 12(B)(1) Because None Of Them Are Subject To Personal Jurisdiction In The State Of Washington

For a federal court to exercise personal jurisdiction over an out-of-state defendant, the plaintiff must satisfy the requirements of the forum state's long-arm statute and the constitutional requirement of due process. *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th Cir. 1995) (citation omitted). Because Washington's long-arm statute[4] imposes no limitations on the exercise of jurisdiction beyond those imposed by the federal due process clause, this Court need only ensure that the Constitution's due process requirements are satisfied. *Chan v. Society of Expeditions, Inc.*, 39 F.3d 1398, 1405 (9th Cir. 1994). Under the Due Process Clause of the U.S. Constitution's Fourteenth Amendment, the Court may only assert jurisdiction over Broadvox (comprised of three non-resident defendants) if it has such "minimum contacts" with Washington that the Court's assertion of jurisdiction does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)

[4] RCW Section 4.28.185.

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(citations omitted). It is Qwest's burden to establish jurisdiction over Broadvox. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). Qwest cannot meet this burden.

Broadvox is subject to neither general nor specific jurisdiction. *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). General jurisdiction exists when a defendant is domiciled in the forum state or his activities there are "substantial" or "continuous and systematic." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984). Broadvox's only link to Washington is a cumulative grand total of eight vendors and seven customers located within this state since Broadvox started doing business in 2001. *See* Blumin Aff. (Ex. A) at ¶21. These transactions have accounted for considerably less than one-half of one percent of Broadvox's purchases and sales. They are isolated and nominal; they are anything but "substantial" or "continuous and systematic."

Nor can Qwest show that Broadvox satisfies the Ninth Circuit's three-part test for specific jurisdiction. This test requires that:

1. The nonresident defendant do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

2. The claim must be one which arises out of or results from the defendant's forum-related activities; and

3. The exercise of jurisdiction must be reasonable.

Panavision, 141 F.3d at 1320 (citation omitted).

The first of the above requirements is the most critical. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997). Although this prong is commonly referred to as the "purposeful availment" prong, it also encompasses the concept of "purposeful direction." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). Qwest cannot satisfy this prong. Broadvox has not purposefully directed

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any activity whatsoever into Washington. Broadvox has never sent any agent here to discuss or negotiate the terms of any contracts or business dealings. Blumin Aff. at ¶13. Broadvox does not direct any advertising or marketing into Washington, and has never registered – or been required to do so– in order to do business in Washington. *Id.* at ¶14. Broadvox has never maintained any financial accounts in Washington, has never owned, leased, or used any real estate in Washington, and has never had an address, post office box, telephone or fax number or listing in Washington. *Id.* at ¶16-19. Nor has Broadvox ever sued anyone in Washington. In short, Broadvox has neither purposefully availed itself of the privilege of conducting activities in Washington nor sought the benefits or protections of Washington's laws.

As to the second prong, in order to prove that a claim arises out of Broadvox' forum-related activities, Qwest must establish that it would not have been injured "but for" Broadvox' conduct targeted toward Qwest in the forum. *Panavision*, 141 F.3d at 1322 (citation omitted). Plainly, Broadvox has intentionally directed no conduct into Washington at all, much less any conduct that could have injured Qwest. *See Calder v. Jones*, 465 U.S. 783, 789 (1984); *Panavision*, 141 F.3d at 1321 (citations omitted).

Finally, Qwest cannot satisfy the third prong – reasonableness – to support the exercise of specific jurisdiction. For such exercise be reasonable, it must comport with traditional notions of "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). Courts generally consider seven factors in assessing reasonableness:

(1) The extent of a defendant's purposeful interjection;

(2) The burden on the defendant in defending in the forum;

(3) The extent of conflict with the sovereignty of the defendant's state;

(4) The forum state's interest in adjudicating the dispute;

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(5) The most efficient juridical resolution of the controversy;

(6) The importance of the forum to the plaintiff's interest in convenient and effective relief;

(7) The existence of an alternative forum.

Id. at 476-77. No single factor is dispositive and courts must balance all seven. *Panavision*, 141 F.3d at 1323 (citation omitted). Qwest fails this prong as well. Broadvox's purposeful interjection is non-existent. The burden on Broadvox in defending in the forum is significant: it is a private company that is very small relative to the size and presence of Qwest. Broadvox cannot speak to the extent of conflict with the "sovereignty" of Texas or Ohio, but in light of the availability of either of those jurisdictions to Qwest, and its presence in both of those states, the remaining four factors all suggest that imposing jurisdiction on Broadvox in Washington would be unreasonable.

Broadvox is not subject to personal jurisdiction in the State of Washington in this matter and the Court should dismiss the complaint against Broadvox for that reason. Further, to the extent that this Court determines that Qwest has failed to meet its burden of demonstrating the Court has jurisdiction, Broadvox seeks recovery of its attorneys' fees and expenses incurred in defending this action. Subsection (5) of Washington's long-arm statute (RCW Section 4.28.185(5)) provides:

> In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the Court as attorneys' fees.

This Court has awarded attorneys' fees under this provision to a defendant in a case where the plaintiff failed to meet its burden of establishing the personal jurisdiction of this Court. *High Maintenance Bitch, LLC v. Uptown Dog Club, Inc.*, 2007 WL 3046265, *5 (W.D. Wash., October 17, 2007).

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As demonstrated above, Qwest has failed to meet its burden of establishing this Court's jurisdiction over Broadvox, and thefore, Broadvox should be awarded the attorneys' fees it has incurred in defending against Qwest's claims.

B. Even If Qwest Can Establish That This Court Has Personal Jurisdiction Over Broadvox, The Court Should Dismiss or Stay This Litigation So That The Dispute May Be Referred To The Federal Communications Commission Under The Doctrine Of Primary Jurisdiction

The Unipoint Defendants argue the Court should dismiss or stay this proceeding on the basis of primary jurisdiction in Section V of the Unipoint Defendants' Motion to Dismiss Or, In The Alternative, Defer To The Primary Jurisdiction of The Federal Communications Commission ("Unipoint Motion"). Broadvox concurs with and incorporates Unipoint's arguments in their entirety.

C. In The Alternative, The Court Should Transfer The Case To The United States District Court For The Northern District Of Texas Pursuant To 28 U.S.C. §1404(a)

Under 28 U.S.C. §1404(a), "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." This statute endows the Court with broad discretion to transfer a federal suit to serve the above interests. *See also Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955) ("Congress ... intended to permit courts to grant transfers upon a lesser showing of inconvenience than the common law *forum non conveniens*."). Section 1404(a) serves "to prevent the waste of time, energy and money, and to protect litigants, witnesses and the public from unnecessary inconvenience and expense." *See Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964).

Under §1404(a), the district court has discretion "to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (internal quotation marks and citation

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omitted). While "great weight is generally accorded plaintiff's choice of forum," less weight is accorded "[i]f the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter." *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). For the reasons previously stated, there are minimal, if any, operative facts connecting Broadvox to Washington, and thus no weight should be given to Qwest's choice of venue.

A motion to transfer venue under §1404(a) requires the court to weigh multiple factors in its determination whether transfer is appropriate in a particular case, including:

(1) the location where the relevant agreements were negotiated and executed;
(2) the state that is most familiar with the governing law;
(3) the plaintiff's choice of forum;
(4) the respective parties' contacts with the forum;
(5) the contacts relating to the plaintiff's cause of action in the chosen forum;
(6) the differences in the costs of litigation in the two forums;
(7) the availability of compulsory process to compel attendance of unwilling non-party witnesses; and
(8) the ease of access to sources of proof.

Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000). The relevant public policy of the forum state, while not dispositive, "is another factor that should be weighed in the court's §1404(a) 'interest of justice' analysis." *Id.* at 499.

The fourth, fifth, sixth and eighth factors all weigh in favor of transferring this case to Dallas. (Other than the third factor, the remaining factors are equal in both Dallas and Seattle). (4) All of the defendants have substantial contacts with Dallas and Texas and almost no contacts with Seattle or Washington. (5) Similarly, few – if any – contacts relating to Qwest's claims occurred in Washington, because of the lack of any contacts whatsoever in Washington. (6) Because all of the parties – plaintiff and defendants – have a substantial presence in Texas, and because that presence is far more substantial in Texas than in Washington, the cost of litigating in Washington will far exceed the cost of

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litigating in Texas. Finally, for the same reason, witnesses and documentary evidence will be more readily available, and at less cost, in Texas than in Washington.

Plaintiff in this action has engaged in forum shopping. It has chosen a forum that has no association with any of the parties, most likely because it believes it provides favorable law. As discussed above, Broadvox believes that venue is improper in Washington, and that justice requires that this case be transferred to Texas. Transfer would be the only prudent and appropriate course of action in the event the Court determines not to dismiss this action for lack of personal jurisdiction and proper venue.

If the Court finds that Broadvox and the other Defendants are somehow subject to jurisdiction in the State of Washington, and declines to refer the case to the FCC, it should transfer the case to the federal court in Dallas under 28 U.S.C. §1404(a).

D. In The Event The Court Retains This Matter, It Should Dismiss The Fraud Claim Under FRCP 9(b) Because Qwest Failed To Plead It With The Requisite Particularity

FRCP 9(b) imposes a heightened standard of pleading in cases alleging fraud and requires that the plaintiff state the circumstances constituting fraud with particularity, and in any event has failed to state a claim for fraud under Washington law. [5] Rule 9(b) requires that any claim alleging fraud "must state with particularity the circumstances constituting fraud or mistake." FRCP 9(b). It is not enough to base allegations on "information and belief," *see Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9th Cir. 1989), as Qwest has done against Broadvox and the other Defendants.[6] The claim must specifically state the "'time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation.'" *Segal Co., Inc. v. Amazon.com*, 280 F. Supp. 2d 1229, 1231 (W.D. Wash. 2003) (*quoting Teamsters Local #*

[5] The pleading standard in FRCP 9(b) applies to state-law causes of action. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003).

[6] *See e.g.*, Complaint ¶¶4, 22,24,26,28,30, and 32.

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427 v. Philco-Ford Corp., 661 F.2d 776, 782 (9th Cir. 1981). Further, the courts of the Ninth Circuit have repeatedly applied Rule 9(b) to require, at a minimum, that the claimant plead evidentiary facts such as time, place, persons, statements, and explanations of why the statements are misleading. *See, e.g. Vess,* 317 F.3d at 1106; *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985); *Cole v. Asurion Corp.*, 2008 WL 5423859, *4 (C.D. Cal. 2008) (*citing In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 n. 7 (9th Cir. 1994)); *Seattle Pacific Indus., Inc. v. Melmarc Prod., Inc.*, 2007 WL 397450, *2 (W.D. Wash. 2007); *Mikron Indus., Inc. v. Hurd Windows & Doors, Inc.*, 2007 WL 3033933, * 1 (W.D. Wash. 2007)(defendants' counterclaims for fraud and misrepresentation did not satisfy the requirements of Rule 9(b) because they failed to specify the time, place, and identities of the parties to the alleged misrepresentations, and further, the fraud allegations were so vague and generalized that the plaintiff had insufficient detail to adequately prepare its defenses). Further, because Qwest has alleged omission of facts as one basis for its fraud claims, Rule 9(b) typically requires Qwest to plead "the type of facts omitted, the place in which the omissions should have appeared, and the way in which the omitted facts made the representations misleading." *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1174 (5th Cir. 2006); *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 381 (5th Cir. 2004). Simply stated, Rule 9(b) requires the claimant to set forth "'the who, what, when, where, and how' of the conduct charged." *See, e.g., Vess,* 317 F.3d at 1106*; Cole,* 2008 WL 5423859, *5*; Seattle Pacific*, 2007 WL 397450, *2; *Mikron*, 2007 WL 3033933, * 1.

When, as Qwest has done, allegations of fraud are asserted against multiple defendants, "each [d]efendant is entitled to be informed of the specific acts that it must defend." *Vess*, 317 F.3d at 1106; *Hawley v. Bus. Computer Training Inst., Inc.*, 2008 WL 3992770, *2 (W.D. Wash. 2008); *Wanetick v. Mel's of Modesto, Inc.*, 811 F. Supp. 1402,

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1405 (N.D. Cal. 1992). The claimant may not rely upon generalized references to acts or omissions by all of the defendants because each defendant named is entitled to notice of the circumstances surrounding the fraudulent conduct with which it is *individually* charged. *Id. at* 1405; *Jacobson v. Peat, Marwick, Mitchell & Co.*, 445 F. Supp. 518, 522 n. 7 (S.D.N.Y. 1977).

If the plaintiff's claim is based in fraud, and the allegations of the complaint fail to satisfy the heightened pleading requirements proscribed in Rule 9(b), a district court may dismiss the claim.[7] A motion to dismiss for failure to comply with the requirements of Rule 9(b) is the "functional equivalent" of a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) because a dismissal for failure to plead fraud with particularity has the same consequence as a dismissal under Rule 12(b)(6). *Id.* If the insufficiently pled allegations of fraud are disregarded, as they must be, there is nothing left of the complaint and a motion to dismiss under Rule 12(b)(6) should be granted. *Id.* at 1107.

In the instant matter, Qwest alleges both fraudulent misrepresentations and omissions, but fails to satisfy the requirements of Rule 9(b) in general, and with respect to each defendant. Qwest alleges misrepresentations, yet references no specific statements by particular defendants at a specific place and time, and provides no explanation of why the alleged misrepresentations may have been misleading. Additionally, Qwest alleges "omissions of material facts,"[8] but does not specifically identify the type of facts allegedly omitted, the place in which the omissions should have appeared, and the way in which the omitted facts made the defendants' representations misleading.

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[7] *Vess*, 317 F.3d at 1107 ("We recognize that there is no explicit basis in the text of the federal rules for a dismissal of a complaint for failure to satisfy Rule 9(b), but it is established law in this and other circuits that such dismissals are appropriate.").
[8] Complaint ¶¶82-87.

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Moreover, even if Qwest's complaint complied with the basic requirements of Rule 9(b) (which it does not), it impermissibly groups all of the defendants together. Not once does Qwest identify a specific defendant and state the specific misrepresentations or omissions it attributes to that individual defendant. Qwest's Complaint consistently and repeatedly makes undifferentiated references to the defendants as a group in its allegations of fraud: "For each long distance call handed by *a Defendant*. . ."[9]; "*Defendants made* each of these misrepresentations and/or omissions. . ."[10]; "*Due to Defendants'* fraudulent conduct . . ."[11]. Qwests' vague and generalized allegations of fraud are insufficient to satisfy the heightened pleading requirements of Rule 9(b), and Broadvox and the other Defendants have insufficient information to adequately respond and prepare their defenses.

Not only has Qwest failed to meet the heightened pleading standard of Rule 9(b), it has also left out an indispensable element of a fraud claim under Washington law[12] and is barred from making such claim pursuant to the filed-rate doctrine. Washington law requires an allegation that defendants have made a representation as to an existing fact.[13] Qwest does not allege that Broadvox or any of the other Defendants made any representation to Qwest whatsoever but rather that "on information and belief" the

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[9] Complaint, ¶82 (Emphasis added).
[10] Complaint, ¶84, 85 (Emphasis added).
[11] Complaint, ¶88 (Emphasis added).
[12] Although Qwest alleges that fraud occurred in the five jurisdictions in its service territory, Broadvox analyzes Qwest's claims under Washington law because the Complaint was filed in this jurisdiction, and Qwest has not argued that the law of a different state should apply. *Valeo Intellectual Property, Inc. v. Data Depth Corp.*, 368 F.Supp.2d 1121, 1125 (W.D. Wa. 2005); *Burnside v. Simpson Paper, Co.*, 123 Wash.2d 93, 864 P.2d 937, 940 (1994) (noting that where a party does not address choice-of-law issues, a Washington court presumptively applies Washington law.)
[13] The nine elements of fraud under Washington law are "(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance upon the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff." *Stiley v. Block*, 130 Wn.2d 486 (1996).

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defendants made misrepresentations "to a CLEC."[14] Qwest's claim that the Defendants committed fraud by "not informing"[15] Qwest likewise fails: Qwest has not alleged that any of them was under a duty to disclose.[16]

Qwest's claim also fails pursuant to the filed-rate doctrine, as explained in the UniPoint Defendants' Motion. Broadvox concurs with, and incorporates, Section IV. of the Unipoint Motion.

E. In The Event The Court Retains This Matter, It Should Dismiss The Complaint On The Grounds That Qwest Has Failed To State A Claim Upon Which Relief Can Be Granted

1. Payment of Tariffed Federal and State Access Charges

The Unipoint Defendants argue in Section III of the Unipoint Motion that Qwest has failed to state a claim on which relief can be granted for payment of federal and state access charges. Broadvox stands in the same position as Unipoint. The Broadvox Defendants are not interexchange carriers (IXCs), the only type of carrier to which access charges are applicable.[17] Qwest does not allege that the Broadvox Defendants are IXCs; rather Qwest alleges generically that the "Defendants" have contracts with one or more unnamed IXCs to carry the traffic at issue.[18] In the interest of conserving judicial resources, Broadvox, joins in and incorporates by reference Section III of Unipoint's Memorandum.

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[14] Complaint ¶4.
[15] Complaint ¶82b.
[16] *See Oates v. Taylor*, 31 Wn.2d 898, 199 P.2d 924 (1948) (noting that ordinarily a duty to disclose a material fact exists only where there is a fiduciary relationship); *Washington Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521, 526, 886 P.2d 1121 (1994).
[17] See Section III.A.1 of Unipoint's Memorandum.
[18] Complaint at ¶¶24-28.

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2. Unjust Enrichment

The Transcom Defendants argue in Section D.5 of their Motion To Dismiss ("Transcom Motion") that Qwest has failed to state a claim on which relief can be granted for unjust enrichment. Broadvox stands in the same position as Transcom. Qwest's Complaint alleges that it used its local exchange facilities "to complete ordinary long-distance telephone calls," but does not allege that any of the Broadvox Defendants sent any calls to be terminated on Qwest's network, nor that Qwest actually completed any calls for the Broadvox Defendants.[19] Further, as discussed above, the Broadvox Defendants carry only VoIP traffic, and thus could not have sent any "ordinary long-distance telephone calls" to Qwest for termination.

In the interest of conserving judicial resources, Broadvox joins in and incorporates Section D.5 of Transcom's Memorandum as if those arguments were fully rewritten herein. For the same reason, Broadvox also concurs with, and incorporates by reference, Section IV. of the Unipoint Motion which argues that Qwest's claim fails pursuant to the filed-rate doctrine.

3. Tortious Interference

The Transcom Defendants argue in Section D.8 of the Transcom Motion that the Court should dismiss Count IV (Tortious Interference) on the basis that Qwest has failed to state a claim. Broadvox stands in the same position as Transcom, in that Qwest has failed to allege any of the five required elements against Broadvox. In the interest of conserving judicial resources, Broadvox, therefore joins in and incorporates by reference Section D.8 of Transcom's Memorandum.

[19] Complaint at ¶1.

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4. Declaratory Judgment

The Transcom Defendants argue in Section D.9 of the Transcom Motion that Qwest has failed to state a claim on which relief can be granted for unjust enrichment. Broadvox concurs with Transcom's arguments in their entirety. In the interest of conserving judicial resources, Broadvox, therefore joins in and incorporates by reference Section D.9 of Transcom's Memorandum.

F. In The Event The Court Retains This Matter, It Should Require Qwest Under FRCP 12(e) To Make A More Definite Statement As To Its Entire Complaint

Rules 8 and 12(e) of the Federal Rules of Civil Procedure require that a complaint be clear and concise, and set forth allegations with sufficient detail that a defending party has the ability to prepare a responsive pleading. As discussed above, Qwest has failed utterly to allege fraud with sufficient particularity under FRCP 9(b). This defect, however, also infects all of Counts in the Complaint, as Qwest makes only undifferentiated and vague assertions against all Defendants as a group. Qwest's Complaint is so vague and ambiguous that neither Broadvox nor the other Defendants can frame a response, thus Broadvox moves under FRCP 12(e) for a more definite statement before interposing a responsive pleading.

Granting a Rule 12(e) motion is appropriate when the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted and therefore cannot reasonably be expected to frame a proper response. FRCP 12(e); *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F. Supp. 940, 949 (E.D. Cal. 1981). Such motion is favored when the complaint is sufficiently general that ambiguity arises in determining the nature of the claim being made. *Van Dyke Ford, Inc. v. Ford Motor Co.*, 399 F. Supp. 277, 284 (E.D. Wis. 1975). In particular, a motion for more definite statement should be granted when a complaint alleges improper motive (such as the intentional fraud alleged in this

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Complaint) requiring the Plaintiff to provide "specific nonconclusory factual allegations that establish improper motive." *Crawford-El v. Britton,* 523 US 574, 597-598 (1998). Further, requiring a more definite statement is appropriate when a complaint alleges claims generically against multiple "defendants" or relies on unspecified "agreements" as a basis for its claims. In such instances, the Court should require the plaintiff to specify the particular defendant allegedly involved in which acts, and to identify particular agreements, including dates and the parties to the agreement. *Van Dyke Ford, Inc. v. Ford Motor Co.*, 399 F. Supp. 277, 284 (E.D. Wis. 1975).

This case falls squarely within the circumstances in which a more definite statement is required. As in *Van Dyke*, where the Court granted the defendant's motion for a more definite statement, the Complaint makes specific mention of the Broadvox Defendants only once, in a paragraph describing the Defendants' corporate existence. Otherwise, the Complaint fails to mention any fact or act specific to the Broadvox Defendants, and instead makes generic, blanket assertions about the entire group of co-defendants. The defect in such generic pleading is especially glaring here because the Complaint does not allege that the co-defendants have engaged in any collective conduct, which might support the use of collective references. Rather, the Complaint names multiple defendants merely because they are alleged to have engaged in similar conduct, though apparently with unrelated, unnamed third parties possibly during some of the same period of time.

Also similar to *Van Dyke*, the Complaint makes unintelligible generic references to "contracts" between defendants and unnamed local and/or long distance carriers, and to "tariffs" through which Qwest and unnamed third parties allegedly conduct business.[20] The Complaint fails to provide any details regarding the contracts the Broadvox

[20] Complaint at ¶¶22, 24, 69.

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Defendants are alleged to have utilized, the parties with whom the contracts were supposedly entered, and the dates, places, acts or omissions allegedly carried out in conjunction with the contract, leaves the Broadvox Defendants unable to prepare a meaningful response. For all of the foregoing reasons, if the Court does not dismiss the Complaint in its entirety for the multiple deficiencies described above, at a minimum, the Court should require Qwest to provide a more definite statement as to the specific acts or omissions, or other conduct that it alleges against Broadvox, including dates, places and persons related to the alleged conduct.

III. CONCLUSION

Qwest's Complaint is seriously deficient and has been filed in the wrong place. It should be dismissed as against Broadvox under FRCP 12(b)(1) because Broadvox is not subject to personal jurisdiction in the State of Washington. Alternatively, the Court should refer the case to the FCC under the doctrine of primary jurisdiction. As a second alternative, the case should be transferred to the U.S. District Court for the Western District of Texas. If the Court retains this case, it should dismiss the Complaint because Qwest has failed to plead its fraud claim with the requisite particularity and it has failed to state a claim on which relief can be granted as to all of the other counts in the Complaint. Should the Court decline to dismiss the Complaint, then it should require Qwest to file a more definite statement as to all pending claims so that Broadvox and the other Defendants are able to prepare a response.

DATED this 6th day of February, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February 2009, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Judy Goldfarb
Judy Goldfarb, Assistant to
David H. Binney

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EXHIBIT

"A-12"

Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION,

Plaintiff,

v.

ANOVIAN, INC.; BROADVOX, INC.; BROADVOX, LLC; BROADVOXGO!, LLC; TRANSCOM HOLDINGS, INC.; TRANSCOM ENHANCED SERVICES, INC.; MASKINA COMMUNICATIONS, INC. (f/k/a TRANSCOM COMMUNICATIONS, INC.); UNIPOINT HOLDINGS, INC.; UNIPOINT ENHANCED SERVICES, INC. (d/b/a "POINT ONE"); and UNIPOINT SERVICES, INC.,

Defendant.

Case No. 2:08-CV-01715-MAT

TRANSCOM DEFENDANT'S MOTION TO DISMISS

Note on Motion Calendar: March 6, 2009

ORAL ARGUMENT REQUESTED

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CASES

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STATUTES

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OTHER AUTHORITIES

MISCELLANEOUS

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I. OVERVIEW AND RELIEF REQUESTED

Plaintiff Qwest Corporation has sued Transcom Enhanced Services, Inc. ("Transcom") and Transcom Holdings, Inc. ("Transcom Holdings") (collectively, the "Transcom Defendants") allegedly for failing to pay access charges. Pursuant to Fed. R. Civ. P. 12(g), which allows multiple, alternative Rule 12 motions to be joined as one, the Transcom Defendants now move to dismiss Qwest complaint on the following bases:

1. Pursuant to Fed. R. Civ. P. 12(b)(2), for lack of personal jurisdiction, as the Transcom Defendants are citizens of Texas for purposes of jurisdiction, and Qwest has alleged and can prove no basis for asserting long-arm jurisdiction (and should have to pay the Transcom Defendants' attorneys fees for such dismissal pursuant to RCW 4.28.185);

2. Pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1404, for improper venue or in the alternative to transfer venue to Dallas-Fort Worth, which is where Transcom is headquartered;

3. Pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim as (i) all claims against the Transcom Defendants prior to June 16, 2006 are barred by Transcom's previous bankruptcy, which bankruptcy proceedings also established that Transcom is not liable for access charges, (ii) Transcom Holdings ceased operations as of that date, so it could not possibly be liable for anything, (iii) all state law claims are barred by the filed-rate doctrine, (iv) Qwest has failed to allege that it provided anything of value to the Transcom Defendants and Qwest already is entitled to receive "reciprocal compensation" under 47 U.S.C. § 251 so all claims for unjust enrichment are barred, (v) Qwest has failed to plead any fraud with particularity as is required by Fed. R. Civ. P. 9, (vi) Qwest has failed to allege any facts suggesting that the Transcom Defendants are common carriers liable for access charges and the previous bankruptcy proceedings established that the Transcom Defendants are not such common carriers, (vii) Qwest has failed to allege any of the

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elements necessary for tortious interference, and (viii) Qwest's claim for declaratory relief is redundant with its other claims and thus must be dismissed.

Finally, if the Court determines to retain jurisdiction, and to not dismiss all of the claims outright, at a minimum Qwest should be required to provide the Transcom Defendants with a more definite statement of the claims against those defendants particularly pursuant to Fed. R. Civ. P. 12(e).

II. PRELIMINARY STATEMENT

In this action, Qwest is alleging that all of the Defendants, including the Transcom Defendants, are liable to Qwest for payment of access charges. As Qwest is well aware, Transcom has obtained three separate rulings from a court of competent jurisdiction establishing unequivocally that (a) Transcom is an enhanced service provider ("ESP"), (b) Transcom is not obligated to pay access charges to anyone, but rather is an end user that pays end user charges, and (c) the service provided by Transcom is different from the service addressed by the FCC in the AT&T order discussed in the Complaint,[1] and therefore the AT&T Order is not applicable to Transcom. *See* Birdwell Aff., Exh. A (Memorandum Opinion of Judge Harlin D. Hale dated April 28, 2005 (the "Memorandum Opinion"));[2] Exh. B, p. 3, ¶ 4 (Order Confirming Debtor's and First Capital's Original Joint Plan Of Reorganization As Modified (the "Confirmation Order"); and Exh. C (Order Granting Transcom's Motion For Partial Summary Judgment (the "Summary Judgment")). Pursuant

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[1] Order, *In The Matter Of Petition For Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, 19 FCC Rcd 7457, Release Number FCC 04-97, released April 21, 2004 (the "AT&T Order"), which Qwest calls the "FCC Order" in Plaintiff's Original Complaint (the "Complaint") (*see* Complaint ¶ 40). Note that Qwest is attempting to make the AT&T Order appear like a universal declaration of the FCC, when in fact it was the opposite. The AT&T Order states specifically that it is limited to the facts of the particular service provided by AT&T (*see, e.g.*, AT&T Order at ¶ 10 ("This order represents our analysis of one specific type of service")), and the Order uses the term "AT&T's Specific Service" 35 times in its 25 paragraphs.

[2] The Memorandum Opinion was later vacated on other grounds. *See* Judgment entered February 9, 2006, in Civil Action No. 3:05-CV-1209-B, AT&T Corp. and SBC Telcos v. Transcom Enhances Services, LLC, in the United States District Court for the Northern District of Texas, Dallas Division.

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to Rule 201 of the Federal Rules of Evidence, Transcom requests that this Court take judicial notice[3] of the Memorandum Opinion, the Confirmation Order, and the Summary Judgment when considering the Motion.

The Transcom Defendants know that Qwest is aware of Transcom's ESP status because Transcom expressly made Qwest aware of its status more than two years ago. By letter dated October 30, 2006 (Birdwell Aff., Exh. D), Qwest wrote to Transcom demanding payment of access charges for traffic routed through third-party Electric Lightwave, LLC ("ELI"). Transcom responded by letter dated November 9, 2006, which attached a copy of the Confirmation Order and pointed out that (a) Transcom is an ESP, and (b) the relevant traffic occurred during Transcom's bankruptcy, so regardless of Transcom's regulatory status any claims by Qwest were barred. Birdwell Aff., Exh. E. The next communication Transcom received was a threat of disconnection by ELI in its letter of December 19, 2006. Birdwell Aff., Exh. F. Essentially, ELI's basis for threatening termination was communications from Qwest alleging that Transcom owed access charges. Transcom responded with its letter dated January 26, 2007, pointing out that Transcom *disclosed from the very beginning* that it was an ESP and would be routing interexchange, TDM-originated traffic to ELI for termination on local trunks. Birdwell Aff., Exh. G. After multiple exchanges, ELI did not terminate, but rather simply refused to renew Transcom's contract by its letter dated March 15, 2007.[4] Birdwell Aff., Exh. H.

Qwest filed its Complaint lumping all of the Defendants together and providing no information regarding its claims as to any particular Defendant. The only Qwest claims of which

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[3] "Ninth Circuit authority allows the Court to consider documents referenced extensively in the complaint, documents that form the basis of plaintiffs' claims, and matters of judicial notice when determining whether the allegations of the complaint state a claim upon which relief can be granted." *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249, 1251 (W.D. Wash. 2007) (citing *United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003)).

[4] Exhibits D, E, F, G, and H are included solely for consideration by the Court in connection with the alternative Motion For More Definite Statement described below in Section D, and are not intended to be considered in connection with the Motion To Dismiss under Rule 12(b)(6).

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Transcom is aware are those discussed in the above correspondence, but Qwest cannot assert those claims against the Transcom Defendants. First, the claims are barred by the Confirmation Order.[5] Second, those claims cannot possibly provide a foundation for a fraud claim (Count V) against the Transcom Defendants because (a) Transcom disclosed up front in the ELI contract that it was an ESP and would not be paying access charges, and (b) Transcom cannot possibly be accused of having "knowledge of falsity" or "intent to deceive" because Transcom has three separate rulings establishing that it is exempt from paying access charges. Without a tort, there can be no tortious interference (Count IV), but even then Transcom is not aware of any contract that the Complaint might be referring to other than the ELI contract, and that was not renewed by ELI based on the actions of Qwest. There can be no unjust enrichment (Count III) because even if Qwest had a claim for unjust enrichment against either of the Transcom Defendants (which it does not, because Transcom is an ESP, and, additionally, Qwest never conferred any benefit on Transcom) that claim would be based on barred claims. And Qwest's claims under federal and state tariffs (Counts I and II) cannot possibly apply to either of the Transcom Defendants because (a) the traffic occurred more than two years ago, and is thus barred by the applicable statute of limitations; (b) again, the claims would be barred by the Confirmation Order; and (c) even if not twice barred, the claims would not stand because Transcom never had any relationship with Qwest, never ordered anything from Qwest, and is not licensed as a carrier (because it is an ESP). Qwest's request for a declaratory judgment (Count VI) appears to be ineffective as to any of the Defendants because it is redundant (i.e., the proposed issue for declaration would be resolved by determination of the other Counts in the Complaint and therefore there is no reason for a declaratory judgment). Qwest should have

[5] *See* Confirmation Order at pages 10-11. Note that Defendant Transcom Holdings is, and always has been, merely a holding company with only administrative activities. As a result of the plan of reorganization confirmed by the bankruptcy court, Transcom Holdings ceased all operations and has had no operations since. Thus, even though Transcom Holdings was not a debtor in the bankruptcy proceeding, any claims relating to activities prior to the effective date of the Confirmation Order would be barred as to Transcom Holdings as well.

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known prior to filing that all of its claims against the Transcom Defendants were barred if they ever existed at all.

In addition to ignoring Rule 11, Qwest also ignored Rule 9 and pled its fraud claims against "all defendants" without any specifics as to any particular defendant. Finally, it is very hard to understand why Qwest is making these claims against any of the Defendants. The FCC has said that only Interexchange Carriers[6] owe access charges based on their obligations under tariffs to the CLEC or ILEC[7] with whom they have a relationship. Transcom is not an IXC (indeed, to Transcom's knowledge, none of the defendants are IXCs). Transcom does not have any form of privity or contractual relationship with Qwest, nor has it ever ordered or received any service from Qwest (so Qwest can't even claim *constructive* ordering, much less actual ordering, under any tariff).

Below, the Transcom Defendants argue initially that this Court cannot properly exercise personal jurisdiction over the Transcom Defendants because of insufficient contacts with the forum state of Washington. Second, Transcom Defendants argue that venue is improper in this Court and the case, if it continues, should be transferred to the Northern District of Texas. Third, the Transcom Defendants assert their motion to dismiss under Rule 12(b)(6), showing that under applicable standards Qwest has failed to state any claim against the Transcom Defendants for which relief can be granted. Finally, and in the alternative, should the Court decide not to dismiss this action, the Transcom Defendants move under Rule 12(e) for a more definite statement so that Qwest can clarify what possible claims it believes it has against the Transcom Defendants.

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[6] Interexchange carriers ("IXCs") are essentially long-distance telephone companies.

[7] Incumbent Local Exchange Carriers ("ILECs") are companies such as Qwest that were the original monopoly telephone company in the area. Competitive Local Exchange Carriers ("CLECs") are companies that compete with ILECs to provide the same services.

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III. FACTUAL BACKGROUND

Transcom is an Enhanced Service Provider ("ESP") also known in the communications industry as an Information Service Provider ("ISP").[8] Transcom provides Voice over Internet Protocol ("VoIP")[9] services to its customers, including interexchange carriers. In providing this information service,[10] Transcom obtains telecommunications service from a carrier vendor and then transforms the aural content of its customers' calls into "data" packets of information. Transcom adds, deletes, or changes some of the original subscriber-generated content; transfers the information (as changed) to a new location; reassembles the packets (as changed); converts the packets (as changed) into "circuit-switched" format; and sends the content (as changed) for transmission to a competitive local exchange carrier ("CLEC"). The CLEC then sends the call (with the changed content) to the recipient or redirects it to an incumbent local exchange carrier ("ILEC") such as Qwest.

The difference between the services provided by Transcom and that provided by telecommunication carriers is simple: Transcom changes the form and content of the

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[8] It is possible to be an Information Service Provider but not an Enhanced Service Provider. As a supplier of VoIP services to its customers, Transcom is both.

[9] Some authorities refer to VoIP as "Internet telephony" or "Internet Protocol (IP) telephony." The phrases "Internet telephony" and "IP telephony" refer to similar, but distinct concepts. IP telephony involves the provision of a telephony service or application using Internet Protocol. IP telephony may be provided over the public Internet or over a private IP network. In contrast, Internet telephony is a subset of IP telephony that is distinguished by the fact that it is provided over the public Internet and uses the domain-name system for routing. *See, e.g.*, In the Matter of Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd. 11501, 11541-51 ¶¶ 83-104 ("*Stevens Report*") (discussing Internet and IP telephony); HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 364, 369 (17th ed. 2001). Transcom uses both public internet and a private internet to provide both IP telephony and Internet telephony. This pleading, however, will generally use the term "VoIP."

[10] "The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153 (20) (West 2009).

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telecommunication and offers enhanced functions; telecommunication carriers switch and transport the form and content of the information *without change*.[11]

Transcom is not a telecommunications carrier. Transcom does not provide any telecommunications service.[12] Instead, Transcom uses telecommunications to provide an information service. As an ESP, Transcom is a customer that obtains telecommunications service from carriers. As an end user and a consumer (customer) of telecommunications service, Transcom is exempt from the access charges that Qwest is trying to collect.[13]

IV. ARGUMENTS AND AUTHORITIES

A. MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE PERSON OF THE TRANSCOM DEFENDANTS.

Pursuant to Fed. R. Civ. P. 12(b)(2), the Transcom Defendants move the Court to dismiss this action as the Court lacks jurisdiction over the Transcom Defendants. This motion is supported by the Affidavit of Scott Birdwell (the "Birdwell Aff.") filed contemporaneously.

1. Jurisdictional Allegations of the Complaint.

Qwest's only jurisdictional allegations relating to the Transcom Defendants are as follows:

> Transcom Holdings, Inc., Transcom Enhanced Services, Inc., and Maskina Communications, Inc. (f/k/a Transcom Communications, Inc.) are Texas corporations with their principal place of business in Fort Worth, Texas. Transcom Enhanced Services, Inc., and Transcom Communications, Inc. are wholly owned

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[11] The Federal Communications Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (West 2009).

[12] "Telecommunications Service" is defined as "the offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) (West 2009).

[13] "Section 69.5 Persons to be assessed. (a) End user charges shall be computed and assessed upon public end users, and upon providers of public telephones, as defined in this subpart, and as provided in subpart B of this part (b). Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." 47 C.F.R. § 69.5. Subsection (a) applies because Transcom is an end user and not a carrier, while (b) cannot apply because Transcom is not a carrier and does not provide any telecom service.

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> subsidiaries of Transcom Holdings, Inc. On information and belief, with regard to the actions alleged in this Complaint, the Transcom defendants function as one entity (collectively, "Transcom"). Transcom operates or utilizes facilities that are used in connection with the transmission of long-distance telephone calls that both originate and terminate in multiple states in which Qwest does business, including Washington.

Complaint, ¶ 13.

As discussed in detail below, most of these statements are demonstrably false and reflect the failure of Qwest to perform even the slightest investigation prior to filing its Complaint.

2. Relationship of Maskina.

Maskina Communications, Inc. (f/k/a Transcom Communications, Inc.) ("Maskina") *was* a wholly-owned subsidiary of Transcom Holdings until December 2004, when it was sold to a third party. Birdwell Aff. at ¶ 3. After the sale of Maskina, neither Transcom nor Transcom Holdings had any ownership or control of Maskina, and Maskina has operated independently since that time. Birdwell Aff. at ¶ 3. In other words, it has been more than four years since Maskina was in any way connected with the Transcom Defendants.

As shown in the above quote, the only jurisdictional allegation in the Complaint relating to Maskina is the suggestion that it is part of the Transcom family of companies and that they "function as one entity." This is patently false. The "function as one entity" allegation was false even before Maskina was sold (see Birdwell Aff. at ¶ 4), but now there is no possible way for Qwest to allege facts that would suggest that either Transcom or Transcom Holdings has any ownership or control of Maskina. Although Qwest voluntarily dismissed its claims against Maskina just prior to the filing of this motion, Qwest attempts to lump Maskina with the Transcom Defendants is emblematic of its lack of investigation.

3. Transcom Holdings.

Prior to June 16, 2006, Transcom was a Texas limited liability company wholly owned by Transcom Holdings. Birdwell Aff. at ¶ 5. Transcom filed for protection under Chapter 11 of the Bankruptcy Code on February 18, 2005, and its plan of reorganization was

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confirmed by the Confirmation Order (Exhibit B hereto) effective June 16, 2006. Birdwell Aff. at ¶ 5.

The Confirmation Order includes a complete release of all claims against Transcom arising from or based in whole or part on "any act or omission, transaction or occurrence from the beginning of time through the Effective Date [i.e., June 16, 2006]. . . ." Confirmation Order at pages 10-11. That release included any "members" of Transcom, which was an LLC at that time. Confirmation Order at 10; *see also* Birdwell Aff., Exh. J, at 4 (Original Joint Plan Of Reorganization Proposed By The Debtor And First Capital Group Of Texas, III, L.P. (the "Plan")). As of June 16, 2006, Transcom Holdings was a "member" of Transcom. Birdwell Aff. at ¶ 5. Thus both Transcom and Transcom Holdings were released by the Confirmation Order, and any of Qwest's claims arising prior to June 16, 2006 are barred both as to Transcom and Transcom Holdings.

Moreover, as part of the Plan, all equity interests that Transcom Holdings held in Transcom were canceled. Birdwell Aff. at ¶ 6 (Plan at page 16, Section 4.08). This eliminated the last asset held by Transcom Holdings. Birdwell Aff. at ¶ 6. Therefore, as of June 16, 2006, Transcom Holdings ceased all operations. Birdwell Aff. at ¶ 6. Since that time, Transcom Holdings has existed only as a shell. Birdwell Aff. at ¶ 6.

Since all claims against the Transcom Defendants relating to conduct prior to June 16, 2006 are barred, any conduct of Transcom Holdings prior to that time would offer no basis for the exercise of personal jurisdiction over the person of Transcom Holdings. Even if it could, however, Transcom Holdings operated only as a holding company prior to that date. Birdwell Aff. at ¶ 7. Prior to June 16, 2006, Transcom Holdings had no activities other than owning the membership interests of Transcom and providing some back-office services for Transcom. Birdwell Aff. at ¶ 7. Transcom Holdings had no activities in any state but Texas. Birdwell Aff. at ¶ 7.

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After June 16, 2006, Transcom Holdings has had no activities whatsoever. Birdwell Aff. at ¶ 7. As such, there is no basis on which this Court could exercise jurisdiction over the person of Transcom Holdings, and Transcom Holdings must be dismissed.

4. Transcom.

As made clear above, the only Transcom Defendant with any activities even remotely relevant to this proceeding would be Transcom, and below we discuss the standards and issues relating to the lack of personal jurisdiction over Transcom.

a. Standards for personal jurisdiction.

The Plaintiff has the burden of demonstrating that this Court has jurisdiction over Transcom. *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). Asserting jurisdiction over Transcom is proper only if (a) it is permitted by a long-arm statute, and (b) the exercise of that jurisdiction does not violate federal due process. *Pebble Beach*, 453 F.3d at 1154. "To satisfy due process, a defendant, if not present in the forum, must have 'minimum contacts' with the forum state such that the assertion of jurisdiction 'does not offend traditional notions of fair play and substantial justice'." *Id.* at 1155.

b. Transcom's activities.

Transcom has no offices, employees, facilities or equipment in Washington. Birdwell Aff. At ¶ 8. It is not registered to do business in Washington and has no registered agent for service of process there. Birdwell Aff. at ¶ 8. As of the date the Complaint was filed, Transcom had no contractual relationships with any business or entity located in Washington. Birdwell Aff. at ¶ 8.

The Complaint fails to explain why Qwest believes this Court can properly exercise personal jurisdiction over Transcom. The language quoted above from paragraph 13 states that "Transcom operates or utilizes facilities that are used in connection with the transmission of long-distance telephone calls that both originate and terminate in the multiple states in which Qwest does business, including Washington." Note that Qwest is not alleging

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that *Transcom* originates or terminates telephone calls in any of those states, but rather that the phone calls happen to originate or terminate in the various states. Essentially, Qwest is alleging that telephone calls pass through a system operated by Transcom, and some of those calls happen to originate or terminate in Washington. In fact, the phone calls that pass through Transcom's system might originate from or terminate in virtually any state in the United States, as well as a variety of foreign countries. Birdwell Aff. at ¶ 9. Transcom provides enhanced services to interexchange carriers, CLECs and other customers. Birdwell Aff. at ¶ 9. The calls could be coming from or going to virtually anywhere in the world. Birdwell Aff. at ¶ 9. It is the calling party, not Transcom, that decides where the call comes from and goes to. Birdwell Aff. at ¶ 9.

As such, Transcom does not engage in the "transaction of any business" within Washington, and the Complaint fails to describe any other act or omission by Transcom that would bring Transcom within the reach of Washington long-arm statute, much less satisfy the "minimum contacts" requirement of due process. Asserting personal jurisdiction over Transcom in this instance would "offend traditional notions of fair play and substantial justice" and Transcom should be dismissed from this action.

5. Attorneys' Fees.

As discussed above, Qwest has the burden of demonstrating that this Court has jurisdiction over Transcom and Transcom Holdings. *Pebble Beach,* 453 F.3d at 1154. One essential element that Qwest must establish is that the assertion of jurisdiction over Transcom and Transcom Holdings is permitted by the Washington long-arm statute. *Id.* Washington's long-arm statute is contained in RCW 4.28.185, and subsection (5) of that statute states as follows:

> In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the Court as attorneys' fees.

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RCW 4.28.185(5). This Court has relied on that provision to award attorneys' fees to a defendant when the plaintiff failed to meet its burden of establishing the personal jurisdiction of this Court. *High Maintenance Bitch, LLC v. Uptown Dog Club, Inc.*, 2007 WL 3046265, *5 (W.D. Wash., October 17, 2007).

As discussed above, it simply is not possible for Qwest to meet its burden of establishing this Court's jurisdiction over the person of Transcom Holdings because Transcom Holdings has never had any activities in the state of Washington, any claims against Transcom Holdings prior to June 16, 2006 are barred, and Transcom Holdings has had absolutely no activities since June 16, 2006. Even a modest investigation by Qwest prior to filing this suit would have informed Qwest that it was inappropriate to include Transcom Holdings as a defendant. Transcom Holdings seeks recovery of its attorneys' fees incurred in defending against this frivolous action.

Similarly, Qwest has failed to articulate any factual basis on which Transcom may be subjected to personal jurisdiction in this Court. To the extent that this Court determines that Qwest has failed to meet its burden as to Transcom, Transcom also seeks recovery of its attorneys' fees and expenses incurred in defending this action.

B. MOTION TO DISMISS FOR IMPROPER VENUE, OR, IN THE ALTERNATIVE, TO TRANSFER VENUE UNDER 28 U.S.C. § 1404.

Pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in the Motion To Dismiss For Improper Venue, Or, In The Alternative, To Transfer Venue Under 28 U.S.C. § 1404 (the "Transfer Motion"), in Section II(C) of the brief contemporaneously filed by the Broadvox Defendants (the "Broadvox Brief").

The Transcom Defendants have their principal place of business and their corporate office in the Dallas-Fort Worth Metroplex ("DFW"). Birdwell Aff. at ¶ 10. All of the books and records, including transaction and billing records, of the Transcom Defendants are located at their corporate office. Birdwell Aff. at ¶ 10. All of the employees or other witnesses

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whose testimony would appear to be relevant to this action are located in or around DFW. Birdwell Aff. at ¶ 10. All servers containing electronically stored information possibly relevant to this action are located in, or accessible from, the corporate office of the Transcom Defendants in DFW (and none are located in Washington). Birdwell Aff. at ¶ 10.

C. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

1. Rule 12(b)(6) Motion to Dismiss Standard.

The Rule 12(b)(6) standard was recently restated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929 (2007). In *Twombly*, the Supreme Court expressly rejected the former "no set of facts" standard set forth in *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). *See, e.g., Malbco Holdings, LLC v. AMCO Ins. Co.*, 546 F. Supp. 2d 1130, 1133 (E.D. Wash. 2008).

In order to avoid dismissal, the plaintiff's complaint must contain allegations that "raise a right to relief above the speculative level" and provide more than mere labels and conclusions. *Twombly*, 127 S. Ct. at 1965; *Peters v. County of Kitsap*, 2008 WL 149176, *1 (W.D. Wash.). A "formulaic recitation" of the elements of a cause of action is also insufficient to survive a Rule 12(b)(6) motion to dismiss. *Twombly*, 127 S. Ct. at 1964-65; *Peters*, 2008 WL 149176, at *1. Finally, the plaintiff's complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 127 S. Ct. at 1974; *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean Geological Formation,* 524 F.3d 1090, 1096 (9th Cir. 2008); *Malbco,* 546 F. Supp. 2d at 1133.

A motion to dismiss under Fed. R. Civ. Proc. 12(b) may be based on (1) the lack of a cognizable legal theory; or (2) the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Conclusory allegations of law and unwarranted inferences, however, are not sufficient to defeat a motion to dismiss. *Cholla Ready Mix, Inc. v. Civish*, 382 F. 3d 969, 973 (9th Cir. 2004); *see also Sprewell*

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v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001) (the court is not required to "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.").

2. The Court May Consider Public Records Without Converting to Summary Judgment.

"Ninth Circuit authority allows the Court to consider documents referenced extensively in the complaint, documents that form the basis of plaintiffs' claim, and matters of judicial notice when determining whether the allegations of the complaint state a claim upon which relief can be granted." *Browne*, 525 F. Supp. 2d at 1251 (*citing Ritchie*, 342 F.3d at 908-09). At the same time, the Court may take judicial notice of matters of public record without converting the motion to one for summary judgment. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 921-22 (9th Cir. 2004).

3. Choice of Law Governing State Law Claims.

In determining the choice of law governing the analysis of state-law claims, federal courts sitting in diversity apply the choice-of-law rules of the forum state. *Kohlrautz v. Oilmen Participation Corp.*, 441 F.3d 827, 833 (9th Cir. 2006). Washington employs a two-step approach to choice of law questions. The Court must first determine whether an actual conflict between Washington and other applicable state laws exists. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 103-04, 864 P.2d 937, 943 (1994); *DP Aviation v. Smiths Indus. Aerospace and Def. Sys. Ltd.*, 268 F.3d 829, 845 (9th Cir. 2001) (applying Washington law where no conflict was shown). If an actual conflict exists, the Court must determine which forum has the "most significant relationship" to the action to determine the applicable law. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976). When the parties do not address choice-of-law issues, the law of Washington presumptively applies. *See Valeo Intellectual Prop., Inc. v. Data Depth Corp.*, 368 F. Supp. 2d 1121, 1125 n.1 (W.D. Wash. 2005).

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In this action, Plaintiff glibly ticked off a list of various states that it claims have some connection to this action, yet failed to provide any specific details of the events or occurrences taking place in any of those states. The Transcom Defendants reserve the right to contest choice of law in the event this action is not dismissed, but for purposes of the motions presented herein believe that the application of Washington law would be appropriate at this juncture of the proceeding.

4. Failure to State a Claim Against the Holding Company.

The Confirmation Order (Birdwell Aff., Exh. B) includes a complete release of all claims against Transcom arising from or based in whole or part on "any act or omission, transaction or occurrence from the beginning of time through the Effective Date [i.e., June 16, 2006]. . . ." Confirmation Order at pages 10-11. That release included any "members" of Transcom, which includes Transcom Holdings. Thus any claim of Qwest arising from any traffic occurring prior to June 16, 2006, is barred both as to Transcom and Transcom Holdings.

Moreover, Qwest has failed to articulate, and cannot possibly articulate, any conduct of Transcom Holdings occurring after June 16, 2006 that would give rise to any claim by Qwest. As part of the Plan, all equity interests that Transcom Holdings held in the Debtor were canceled. *See* Plan at page 16, Section 4.08. Qwest cannot allege that Transcom Holdings has had any ownership interest in Transcom since that time, nor can Qwest allege that Transcom Holdings has engaged in any activities since that time. The Plan (which is a public record) makes clear that all membership interests in Transcom were canceled as of June 16, 2006, leaving Transcom Holdings with no connection to Transcom. Plaintiff's conclusory allegation that Transcom and Transcom Holdings "function as one entity" must be disregarded, leaving the Complaint devoid of any allegations supporting any claim against Transcom Holdings.

Pursuant to Rule 201 of the Federal Rules of Evidence, the Transcom Defendants request that the Court take judicial notice of Exhibits A, B, C, and J attached to the Birdwell Affidavit for purposes of this Motion.

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5. Failure to State a Claim For Any Conduct or Activity Prior to June 16, 2006.

As discussed above, the Confirmation Order includes a release of liability for all claims against Transcom up to the Effective Date, which was June 16, 2006. Qwest cannot possibly state a claim for any traffic or other activities prior to June 16, 2006.

6. Failure to State a Claim For Unjust Enrichment.

Under Washington law, a claim for unjust enrichment requires Qwest to allege that the Transcom Defendants actually received something from Qwest. *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2008). There, the Court took the opportunity "to conceptually clarify the distinction between 'unjust enrichment' and 'quantum meruit.'" *Id.* at 483. Initially, the Court pointed out that "unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Id.* at 484. Stating a claim for unjust enrichment requires the Plaintiff to plead that (1) a benefit was conferred upon the Defendant by the Plaintiff, (2) the Defendant had an appreciation or knowledge of that benefit, and (3) the Defendant accepted or retained the benefit under circumstances that make it inequitable for the Defendant to retain the benefit without payment of its value. *Id.* at 484.

In other words, the crux of an unjust enrichment claim is that there was a specific benefit received by the defendant. The Transcom Defendants have never received anything from Qwest, and Qwest's Complaint never alleges that it paid or delivered anything to the Transcom Defendants. Although the Complaint alleges generally that Qwest performed the service of transporting and completing telephone calls (Complaint, ¶ 1) the Complaint never alleges that any of the Defendants sent any calls to Qwest, nor does it allege that Qwest ever performed such services for any of the Defendants. In fact, Qwest admits that any such calls are routed "through an intermediate local exchange carrier." Complaint, ¶ 1. On its face, the Complaint makes clear that Qwest never provided any services to any of these Defendants.

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But even if the Complaint suggested or alleged that such services were provided to the Defendants, or to some of them, it still would not state a claim for unjust enrichment. The provision of a service to a party under circumstances where the performing party expects to be paid clearly would fall under the concept of quantum meruit (implied-in-fact contract) rather than unjust enrichment (implied-in-law contract). *Young*, 164 Wn.2d at 484-485. And even if Qwest had the option of arbitrarily choosing between unjust enrichment and quantum meruit (which it does not), the Complaint makes clear that no benefit was delivered by Qwest to the Transcom Defendants (or to any of the Defendants, for that matter), and so Qwest cannot state any set of facts that would establish a cause of action under the rubric of unjust enrichment.

Moreover, even if everything said above were not true, the unjust enrichment claim is simply untenable in this action. In this case, Qwest seeks damages for unjust enrichment based on the alleged failure of Transcom and the other defendants to pay access charges for Qwest's traffic termination services. *See Complaint at* ¶¶ 61-67. But Qwest does not and cannot allege that it has not been compensated *at all* for its services; rather, it alleges only that it has not received compensation in its preferred form: access charges. *Id.* ¶¶ 29, 66.

The reason Qwest does not (and cannot) allege that it has not received reasonable value is because federal law entitles Qwest to receive or waive "reciprocal compensation" payments from interconnecting CLECs[14] (i.e., parties other than defendants) for all traffic ***not*** subject to access charges. 47 U.S.C. § 251(b)(5), (g) (West 2008). As a matter of law, those reciprocal compensation payments constitute reasonable payment for Qwest's termination service. The Communications Act ensures that reciprocal compensation rates are just and reasonable by requiring that they reflect "a reasonable approximation" of the costs associated with handling the traffic. 47 U.S.C. § 252(d)(2)(A)(ii) (West 2008); *see also U.S. West Comm.,*

[14] Qwest does not allege that it provides access services directly to the defendants. Rather, it alleges that the defendants deliver traffic to a CLEC, which hands the traffic to Qwest for termination. *See* Complaint ¶ 4.

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Inc. v. Washington Utils. & Transp. Comm'n, 255 F.3d 990, 994 (9th Cir. 2001) ("[T]he reciprocal compensation rate must be based on the carrier's *costs incurred* transporting and terminating the call and on a reasonable approximation of the additional *costs incurred* terminating calls originating on the other carrier's network.") (emphasis in original).[15]

Moreover, the Communications Act charges local exchange carriers (like Qwest) with the obligation to establish applicable reciprocal compensation rates. 47 U.S.C. § 251(b)(5); *see also* 47 C.F.R. § 51.703. By imposing this duty on LECs themselves, the Act "ensur[es] that all LECs receive *reasonable compensation* for transporting and terminating the traffic of competing local networks with which they are interconnected." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd. 14171, 14248 ¶ 226 (1996) (emphasis added).

Thus, by operation of law, Qwest is entitled to reciprocal compensation payments whenever it does not receive access charge payments. And, as a matter of law, those payments are reasonable because (1) they reflect the costs associated with handling the traffic in question, and (2) Qwest itself had an obligation to establish the reciprocal compensation arrangement governing the rates. For all of the above reasons, Qwest has failed to state a claim for unjust enrichment as a matter of law.

In addition, pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in Section V of the brief filed by the Unipoint Defendants (the "Unipoint Brief") contemporaneously with the filing of this Memorandum seeking dismissal of all state-law claims under the Filed Rate Doctrine.

[15] Qwest does not allege that any traffic that may have been handled by any of the defendants burdens its systems in any greater way than other traffic. *Cf.* Complaint ¶ 39.

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7. Failure to State a Claim For Fraud.

Pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in Section II(D) of the Broadvox Brief seeking dismissal of Qwest's fraud claims on grounds of failure to plead fraud with requisite particularity under Rule 9.

In addition, pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in Section V of the Unipoint Brief seeking dismissal of all state-law claims under the Filed Rate Doctrine.

8. Failure to State a Claim For Recovery of Access Charges.

Pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in Section IV of the Unipoint Brief and likewise assert that Qwest has failed to allege common carrier status and failed to allege facts showing that any of the Defendants are IXCs.

9. Failure to State a Claim for Tortious Interference.

To state a claim for tortious interference with a contractual relationship or business expectancy, Qwest must plead five elements:

(1) The existence of a valid contractual relationship *or* a valid business expectancy;

(2) that Defendants had knowledge of that particular relationship;

(3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy;

(4) that Defendants interfered for an improper purpose or used improper means; and

(5) resultant damage.

Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288, 300 (1997).

Qwest has failed to allege any of these elements as to the Transcom Defendants. Reading the Complaint offers the Transcom Defendants not even the slightest clue as to what contractual relationship Qwest is talking about, or how any conduct of the Transcom Defendants

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would have had any effect on such a contractual relationship. The idea that failing to pay Qwest interferes with Qwest's contract with some third party simply does not make sense.

Regardless, such conclusory allegations simply are not sufficient under the standards governing a Rule 12(b)(6) motion to dismiss, and the tortious interference claim must be dismissed.

In addition, pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in Section V of the Unipoint Brief seeking dismissal of all state-law claims under the Filed Rate Doctrine.

10. Failure to State a Claim for Declaratory Judgment.

In deciding whether to hear a claim for declaratory relief, courts consider two criteria: (1) whether the judgment "will serve a useful purpose in clarifying and settling the legal relations in issue;" and (2) whether the declaratory judgment "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *McGraw-Edison Co. v. Preformed Line Prod., Co.*, 362 F.2d 339, 342 (9th Cir. 1966).

Courts generally refuse to hear a declaratory judgment action if it is redundant with the plaintiff's other claims for relief. *See, e.g., Celador Int'l Ltd. v. Walt Disney Co.*, 347 F. Supp. 2d 846, 858 (C.D. Cal. 2004)(dismissing plaintiff's claim for declaratory relief because the declarations sought would be resolved during other phases of the lawsuit); *Burton v. William Beaumont Hosp.*, 373 F. Supp. 2d 707, 723 (E.D. Mich. 2005) (finding plaintiffs' claim for declaratory relief duplicative of the substantive claims set forth in the complaint).

In the instant matter, the issues raised in Plaintiff's request for declaratory relief are redundant with the issues that must be addressed in connection with the other causes of action asserted in the Complaint. Moreover, providing declaratory relief would not settle this matter because plaintiff has already alleged damages and seeks monetary and injunctive relief in this proceeding. Plaintiff's declaratory judgment claim should be dismissed because it is redundant of the relief sought in the substantive counts and, therefore, serves no useful purpose.

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In addition, pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in Section V of the Unipoint Brief seeking dismissal of all state-law claims under the Filed Rate Doctrine.

D. ALTERNATIVE MOTION FOR DEFINITE STATEMENT UNDER RULE 12(E).

Pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in Section F of the Broadvox Brief seeking a more definite statement under Rule 12(e), and in support of such motion the Transcom Defendants submit Exhibits D through H, attached to the Birdwell Affidavit and incorporated herein by reference.

V. CONCLUSION

Qwest knew or should have known at the time it filed its complaint that it could not possibly assert any claims against the Transcom Defendants. The Transcom Defendants ask the Court to enter an order dismissing this action for want of personal jurisdiction and award it its costs and attorneys fees. Otherwise, the Court should dismiss for improper venue; or, in the alternative, enter an order transferring this case to the Northern District of Texas pursuant to 28 U.S.C. § 1404. If the Court determines to retain jurisdiction, then substantively all claims against the Transcom Defendants should be dismissed for the above reasons pursuant to Rule 12(b)(6); or, in the alternative, the Court should order Qwest to provide a more definite statement pursuant to Rule 12(e), and grant the Transcom defendants leave to move once again to dismiss once Qwest has provided that more detailed complaint.

DATED this 6th day of February, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all counsel of record.

s/Brian W. Esler

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EXHIBIT

"A-13"

HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION,

Plaintiff,

vs.

ANOVIAN, INC., et al.

Defendants.

Case No. 2:08-cv-01715-RSM

UNIPOINT DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, DEFER TO THE PRIMARY JURISDICTION OF THE FEDERAL COMMUNICATIONS COMMISSION

NOTE ON MOTION CALENDAR:

March 6, 2009

ORAL ARGUMENT REQUESTED

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Plaintiff Qwest has filed a deliberately ambiguous complaint that obscures its failure to plead a cognizable tariff claim for access charges and invites this Court to cure Qwest's failure by crafting new federal telecommunications policy. Qwest may not, however, duck the plain language of the Federal Communications Commission's access-charge rules through a series of vague and conflicting allegations that would permit an access-charge claim to proceed against any and all entities that, in Qwest's view, "participate" in the services at issue anywhere along the line.

"Access charges" are the federally mandated fees that some types of communications companies pay to local phone companies for the privilege of routing calls over the local phone company's lines. Under Federal Communications Commission ("FCC") regulations, only certain types of communications companies—those that qualify as interexchange carriers ("IXCs")—are liable for access charges. Nowhere, however, does Qwest allege that UniPoint is an IXC. Instead, UniPoint[1] (like the other defendants) is left to guess what particular actions it is accused of taking, and how it might be liable for access charges without being alleged to be an IXC.

A complaint seeking access charges from entities not alleged to be IXCs fails to state a claim. UniPoint therefore moves for dismissal pursuant to Rule 12(b)(6). In the alternative, UniPoint moves for dismissal pursuant to the doctrine of primary jurisdiction on the ground that the Complaint raises contentious issues of law and policy that should be resolved in the first

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[1] Qwest has named UniPoint Holdings, Inc.; UniPoint Enhanced Services, Inc. (d/b/a "PointOne"); and UniPoint Services, Inc. as defendants. UniPoint Services Inc. and UniPoint Enhanced Services, Inc. (d/b/a "PointOne") are two wholly owned Texas subsidiaries of UniPoint Holdings, Inc. For simplicity, these three Defendants are collectively referred to herein as "UniPoint." This designation for purposes of this motion does not waive or in any way concede the corporate separateness of those three entities.

instance by the FCC.

I. Introduction

Even crediting all the allegations of Qwest's exceedingly ambiguous Complaint, the defendants in this case are a disparate group. They are not alleged to be co-conspirators or even to act jointly in handling any of the unspecified communications at issue in this case. What the ten defendants are alleged to have in common is the use of new technology—"internet protocol" or IP—to participate in the transmission of communications and to threaten Qwest's revenue stream.

The Complaint is notably (and deliberately) vague as to what UniPoint may have done that could give rise to liability, and how such conduct might plausibly entitle Qwest to relief. Qwest's Complaint gathers the disparate defendants, introduces itself and them to the Court in the first 14 paragraphs, and then never again alleges *any* specific conduct by *any* of them. It resorts instead to hopelessly broad generalizations. These include puzzling and contradictory allegations about the "defendants" in general, such as the allegation that each defendant "acts as an interexchange carrier with regard to these calls," Cmplt. ¶ 18, and that some or all defendants simultaneously have IXCs as customers. *See, e.g., id.* ¶¶ 25-26.

Moreover, Qwest qualifies many of its allegations as based only on "information and belief," *see, e.g., id.* ¶¶ 4, 22, 24, 26, 28, 30, while it phrases others in ways that make it impossible to tell whether they pertain to the alleged liability of any particular defendant. *See, e.g., id.* ¶ 5 (alleging that some or all "Defendants" change call-record information for "many" of the calls at issue), ¶ 27 (alleging that "the Defendant typically, either directly or indirectly, modifies the billing information" for calls), ¶ 27 (alleging that "the Defendant" causes replacement of call-record information for "many" calls). Qwest's Complaint thus has all the

clarity of a Rorschach test, but it must be dismissed no matter what Qwest contends may be seen in it.

Qwest may hope its deliberately ambiguous Complaint can proceed on a basis that makes each defendant's actual conduct essentially irrelevant under its sweeping (and unsupported) theory: that every entity that "participate[s]" in the transmissions at issue thereby "acts" as an IXC, and that any such entity may be liable for access charges "because" it does so. *See id.* ¶ 18. But that claim must be dismissed under Rule 12(b)(6) because Qwest is clearly not entitled to relief on that basis under existing law. Only IXCs are subject to access-charge payments, but Qwest does not allege that UniPoint is the IXC for the communications at issue. *See infra*, § IV.A.

Alternatively, Qwest may simply intend to force its smaller competitive rivals to undergo the burden and expense of defending federal litigation in a distant forum in hopes that discovery might yield the unalleged facts that would establish a traditional access-charge claim against an IXC. But a plaintiff cannot wield the court as its cudgel in this way. The Supreme Court has clarified recently that such fact-free pleading is insufficient because it fails to make a showing of entitlement to relief under Rule 8(a) and hence must be dismissed under Rule 12(b)(6). *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007). *See infra* § IV.B.

If, on the other hand, Qwest intends to argue for an extension of the law that would spread access-charge liability beyond IXCs to all participants in certain transmission streams, then it is manifestly in the wrong forum. Any such novel claim should be deferred in favor of the primary jurisdiction of the FCC. *See infra* § VI.

Qwest's common-law claims must also be dismissed because they are all barred under

the filed-rate doctrine. *See infra* § V. In addition, UniPoint joins and adopts several of its co-defendants' motions and arguments to the Court. In particular, UniPoint joins the Transcom Defendants' argument that information service providers are exempt from access charges, *see* Transcom Mot. § III, and their motion to dismiss Qwest's unjust enrichment claim, *see* Transcom Mot. § IV.C.6., tortious interference claim, *see id.* § IV.C.9., and declaratory judgment claim. *See id.* § IV.C.10. Likewise, UniPoint joins the Broadvox Defendants' motion to dismiss Qwest's fraud claim, *see* Broadvox Mot. § II.D, and its motion for more definite statement. *See id.* § II.F. Finally, UniPoint joins the Broadvox Defendants' motion to transfer the case to the Northern District of Texas, *see id.* § II.C, and it offers the attached Affidavit of J. Michael Holloway in support of the motion to transfer. *See* Exhibit A.

II. Regulatory Background

Fully appreciating Qwest's legal gymnastics (and the reasons its access-charge claims must be dismissed) requires an appreciation of an unfortunately convoluted regulatory regime. In highly simplified form, two types of communications providers offer service in the traditional, wireline communications system. The first type, local exchange carriers ("LECs") like Qwest, transport calls within local exchanges and provide "access" to the end-user customers on either end of the call.[2] (Consumers typically refer to LECs as local telephone companies.) The second type, IXCs, transport calls between local exchanges, and they rely on the LECs at either end for access to consumers.[3] (Consumers typically refer to IXCs as long-distance telephone

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[2] *See, e.g., Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1071 n.2 (8th Cir. 1997) ("LECs provide local telephone service or offer local access for long-distance service.") (citing 47 U.S.C. § 153(26), (47), (16)); *Developing a Unified Intercarrier Comp. Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, 9613-14 ¶¶ 5-8 (2001).

[3] *See, e.g., Iowa Network Servs. v. Qwest Corp.*, 363 F.3d 683, 688 (8th Cir. 2004) ("[A]n interexchange carrier (IXC) is a long-distance carrier who provides intrastate or interstate long-

companies.)

Qwest's lawsuit delves into the regulatory treatment of a new communications technology: IP telephony. Like other former Bell telephone companies (known as incumbent LECs or "ILECs"), Qwest faces an increasing competitive threat from services that provide communications over the Internet using IP technology rather than solely over the traditional public switched telephone network ("PSTN"). Qwest (like other ILECs) receives "access charge" payments under federal law when it originates or terminates traditional PSTN long-distance calls carried by IXCs, but federal law does not extend access-charge liability to non-IXCs, including private carriers and information service providers (as opposed to common carriers). For all traffic not subject to access charges, federal law entitles Qwest (and other ILECs) to a different type of compensation—either "reciprocal compensation" or end-user business-line charges depending on the circumstances—when it originates or terminates calls.[4]

Because "access charge" payments provide ILECs with inflated revenue streams relative to reciprocal compensation,[5] Qwest has commenced this suit in the hopes of convincing the

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distance communications services between local exchange areas."); *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exch. Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, 9938 ¶ 38 (2001) ("IXCs . . . purchase access service as an input for the long distance service that they provide to their end-user customers.").

[4] *See* 47 U.S.C. § 251(b)(5). The FCC has recognized that this provision, operating alone, "would require reciprocal compensation for transport and termination of *all* telecommunications traffic," without exception. *See Implementation of the Local Competition Provisions in the Telecomm. Act of 1996; Intercarrier Comp. for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9166 ¶ 32 (2001) (emphasis added).

[5] The access charge regime—a legacy of the old regional ILEC monopolies—is recognized as an above-cost and anti-competitive anachronism. *See, e.g., Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15,982 ¶¶ 32, 35 (1997). The FCC is wrestling with reform of this and other aspects of its intercarrier compensation system in several docketed proceedings. It is also considering the ILECs' efforts to extend the access-charge regime to IP-enabled services and business practices—the precise effort Qwest undertakes in the Complaint at issue here. *See id.*; *see also infra* § VI.

Court to adopt an intercarrier-compensation regime more favorable to Qwest's own bottom line.

III. The Standard for Dismissal Under Rule 12

A motion to dismiss for failure to state a claim tests a complaint in two ways. "Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or absence of sufficient facts alleged under a cognizable legal theory." *Presidio Group, LLC v. GMAC Mortgage, LLC*, No. C08-5298RBL, 2008 U.S. Dist. LEXIS 98122, at *7 (W.D.Wash. Dec. 3, 2008) (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). In deciding a motion to dismiss, a court "must assume that the [plaintiff] can prove the facts alleged in its ... complaint. It is not, however, proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the ... laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Counsel of Carpenters,* 459 U.S. 519, 526 (1983).

To survive a 12(b)(6) motion, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 127 S.Ct. at 1974. A plaintiff alleging facts that are merely conceivable does not meet his burden. *See id.* "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,... a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65.

IV. Qwest's Assertion that Defendants Are Liable for Access Charges Because They "Participate" in the Communications at Issue and Thereby "Act" as IXCs Does Not State a Cognizable Legal Claim (Counts I and II)

Qwest's allegations against UniPoint (and, indeed, each defendant) are remarkably free of factual content. Although Qwest spills a full 95 numbered paragraphs of ink, it manages to make *no* specific allegation about UniPoint outside of the 14th paragraph in which it merely

identifies the UniPoint entities. The legal basis on which Qwest hopes to proceed despite this ambiguity emerges soon thereafter.

In the following two paragraphs, Qwest alleges that "[e]ach and every Defendant is a Telecommunications Carrier," Cmplt. ¶ 15, and "participates in the provision of Telephone Toll Service because each and every Defendant participates in the routing of telephone calls between local exchanges" on the PSTN. *Id.* ¶ 16. Then, in paragraphs 17 and 18, it makes the key allegations upon which its entire Complaint rests:

> By participating in the provision of Telephone Toll Service, each and every Defendant benefits from Qwest's terminating access services and is obligated to pay for such access services as provided in Qwest's federal and state tariffs.

Id. ¶ 17. "Because they participate in the provision of Telephone Toll Service with regard to the calls at issue in this Complaint," Qwest alleges, "each and every Defendant acts as an [IXC] with regard to these calls." *Id.* ¶ 18.

Thus, advancing the theory that everyone who participates in the provision of the service at issue is liable for access charges, Qwest attempts to plead its claims without alleging *any* specific actions by UniPoint (or, again, any defendant) that make it liable. Rather, the remaining 78 numbered paragraphs make general allegations about how, in Qwest's view, the access-charge regime is supposed to work, *see id.*¶¶ 18-21, how "defendants" generally evade such charges, *see id.* ¶¶ 22-32, legal argument about IP telephony and a particular FCC decision, *see id.* ¶¶ 33-44, and formulaic recitations of the elements of six pled causes of action. *See id.* ¶¶ 45-95.

The Court and each defendant are left to guess as to what acts by any particular defendant are claimed to result in liability. Qwest does not assert that any particular defendant performed

any of the acts alleged, nor does it assert that all of them did. It does not assert that some defendants committed some of the asserted acts and other defendants other acts, let alone which defendants might have done what. Instead, having alleged that all defendants are involved in this business somehow and that this business involves a number of specific practices, Qwest attempts to haul them all into court to box the shadows it casts. The Complaint thus fails to state a claim, and it must be dismissed as a result.

A. Only IXCs Are Subject to Access Charges, and Qwest Does Not Allege UniPoint to Be an IXC

To the extent the Complaint demands access charges from defendants not alleged to be IXCs, it must be dismissed because it lacks a cognizable legal theory. As a matter of law, access charges apply only to IXCs, and, by legal definition, all IXCs are common carriers. Qwest does not allege that UniPoint is an IXC or that it is a common carrier of any kind; in fact, it alleges repeatedly that the IXCs for the traffic at issue are various unnamed "customers" of some or all of the defendants. *See* Cmplt. ¶¶ 24-28.[6] Accordingly, Qwest has failed to state a claim for access-charge liability as a matter of law, and its Complaint merits dismissal pursuant to Rule 12(b)(6).

1. Only IXCs Are Liable for Access Charges

Part 69 of the FCC's rules governs the access charges that lie at the heart of Qwest's claims. In particular, Section 69.5(b) provides that "[c]arrier's carrier charges"—commonly known as access charges—"shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign

[6] More specifically, the Complaint alleges with characteristic ambiguity that some or all of the Defendants receive traffic from unnamed IXCs and hand it off to unnamed competitive local exchange carriers ("CLECs"). *See id.* ¶ 28.

telecommunications services." 47 C.F.R. § 69.5(b).[7] The regulation, by its black letter, applies "carrier's carrier charges" only to IXCs, not to other entities, such as private carriers or information service providers.

This long-standing rule is pivotal in this case because Qwest has failed to allege a required element of its claim: that UniPoint is an IXC. Qwest attempts to finesse its way around this failing by asserting that UniPoint (like the other defendants) "*acts*" as an IXC because it "participate[s]" in some unspecified way in the communications at issue. *See* Cmplt. ¶ 18 (emphasis added). But the law applies access charges only to IXCs themselves, not to any and all entities that "participate" in the handling of these communications and therefore allegedly "act" like an IXC.[8] Put differently, many entities "participate" in the transmission of interexchange communications. Some provide enhanced services, and some do not. Some operate on a common-carrier basis, and some by private contract. The numerous participants in this market offer a bewildering variety of technologies and services. But the law allows an ILEC

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[7] The "access charges" Qwest pursues in this action are "carrier's carrier" charges. *See, e.g.,* Cmplt. ¶¶ 19, 20 (explaining the access charge regime applicable to IXCs for interexchange calls).

[8] There is simply no rule of law that applies access charges to entities that "act" like IXCs or otherwise perform functions arguably similar to those of any IXC. As explained below in Section IV.A.2., the FCC has held that access charges apply only to the actual IXC, not to other providers in the transmission chain. *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Servs. Are Exempt from Access Charges*, Order, 19 FCC Rcd. 7457, 7469-72 ¶¶ 19, 23 n.92 (2004) ("*AT&T Order*"). Moreover, it is not at all unusual for entities that arguably "act" like an IXC to avoid access-charge liability. Local cellular-phone traffic, for example, can traverse the interexchange network, but this does not somehow rewrite the regulatory scheme to impose access charges on non-IXC providers. *See Atlas Tel. Co. v. Oklahoma Corp. Comm'n,* 400 F.3d 1256, 1266 (10th Cir. 2005) (rejecting assertion that intra-MTA CMRS traffic "qualifies as exchange access traffic because it transits the IXC network"). Likewise, long-distance traffic reaching the public-switched telephone network through routing known as "leaky" PBXs has long been exempted from access charges. *See* 47 C.F.R. § 69.115. Finally, local exchange carriers carrying transit traffic from a third party to a cellular carrier are not required to bear the access charges with respect to that traffic. *See Texcom, Inc. v. Bell Atl. Corp.,* Memorandum Opinion and Order, 16 FCC Rcd. 21493, 21496 ¶ 8 (2001).

to collect tariffed access charges only from an IXC. *See* 47 C.F.R. § 69.5(b).

The futility of Qwest's claim is revealed in its repeated allegations that UniPoint's *customers* (not UniPoint itself) are the IXCs with respect to the communications at issue. *See, e.g.,* Cmplt. ¶ 25 (allegations about the relationship between defendants and "the interexchange carriers who are their customers"); ¶ 26 (allegations regarding IP conversions when "a Defendant takes a long-distance call from one of its interexchange carrier customers"); ¶ 27 (allegations regarding billing data after a defendant "receive[s] a long-distance call from one of its interexchange carrier customers"). Because Qwest does not and cannot allege that UniPoint is itself an IXC (and, in fact, makes the contradictory allegation that UniPoint's customers are the IXCs), the claims for access-charge payments fail as a matter of law.

Moreover, Qwest does not allege that UniPoint is a common carrier of any sort—a fatal omission because only common carriers can qualify as IXCs. As noted above, Rule 69.5(b) provides that "carrier's carrier charges" (*i.e.,* access charges) are assessed on "interexchange carriers." 47 C.F.R. § 69.5(b). Under the Communications Act, the term "carrier" has a fixed meaning: It means a "common carrier." 47 U.S.C. § 153(10) (defining "carrier" as "common carrier").[9] Therefore, only a common carrier may be an "interexchange carrier" under the Communications Act, and Rule 69.5 imposes "carrier's carrier" access charges only upon common carriers providing interexchange service.

Nor has Qwest made any factual allegations that would suggest that UniPoint is a common carrier under the two-part test crafted by the federal courts. *See Nat'l Ass'n of*

[9] *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 & n.10 (1979) (explaining that "carriers" under the Communications Act hold themselves out to serve the general public indifferently, without individualized decision-making as to customer dealings); *Request for Review of the Decision of the Universal Serv. Adm'r by Virginia State Dep't of Educ.*, Order, 17 FCC Rcd. 8677, 8678 ¶ 3 (2002).

Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976) ("*NARUC I*") (holding that courts "must inquire, first, whether there will be any legal compulsion ... to serve indifferently, and if not, second, whether there are reasons implicit in the nature of [the service at issue] to expect an indifferent holding out to the eligible user public"); *Midwest Video Corp.*, 440 U.S. at 701 (endorsing the *NARUC I* test). Indeed, Qwest does not and cannot allege that UniPoint is legally obligated to serve all comers indifferently, nor does Qwest allege that anything in the nature of UniPoint's service causes it to hold itself out to the general public indifferently regardless of legal obligation. Qwest does not allege that UniPoint fails to choose individual customers or to negotiate differing terms to differing customers. And while Qwest asserts that UniPoint is a telecommunications carrier, *see* Cmplt. ¶ 15, it does not allege that UniPoint provides telecommunications services—the only situation in which a telecommunications carrier operates as a common carrier. *See* 47 U.S.C. § 153(44), (46). Thus failing to allege that UniPoint is a common carrier or an IXC, and lacking any factual allegations that would allow a finding that UniPoint is a common carrier or an IXC, Qwest has failed to state a claim for nonpayment of access charges.

A claim that a non-common carrier has violated duties imposed only upon a common carrier is subject to dismissal. *See Howard v. America Online, Inc.*, 208 F.3d 741, 752-53 (9th Cir. 2000). In *Howard*, as in this case, the plaintiff claimed that a non-common-carrier was liable under obligations that federal communications law imposes only upon common carriers. The district court dismissed the complaint (and the Ninth Circuit later affirmed), holding that the defendant was not a common carrier and therefore could not be liable for violating a duty applicable only to common carriers. *See id.; see also America Online, Inc. v. Greatdeals.net*, 49

F. Supp. 2d 851, 855-57 (E.D.Va. 1999).

Similarly, in this case, Qwest's claims against UniPoint rest entirely upon nonpayment of access charges—a liability imposed solely upon common carriers. *See* 47 C.F.R. §§ 69.4, 69.5. As UniPoint is not even alleged to be a common carrier anywhere in Qwest's 95-paragraph complaint, Qwest's claims here must likewise be dismissed. *Cf. Presidio*, 2008 U.S. Dist. LEXIS 98122 at *7-*9 (where 195-page complaint fails to make factual allegations necessary to support conclusory allegations, it must be dismissed under Rule 12(b)(6) and *Twombly*).

2. *The FCC's AT&T Order Did Not Change the Rule that Access Charges Apply Only to IXCs*

Qwest has attempted to circumvent this failing by suggesting that the FCC's 2004 *AT&T Order* somehow changed the long-standing regulatory regime so that access charges thereafter applied to entities like UniPoint. *See* Cmplt. ¶¶ 40-44 (discussing *AT&T Order*, 19 FCC Rcd. 7457 (2004)). The FCC did nothing of the sort. To the contrary, the *AT&T Order* confirms the pre-existing rule that access charges apply only to IXCs. *See AT&T Order*, 19 FCC Rcd. at 7471 ¶ 23 n.92 (confirming that "access charges are to be assessed on interexchange carriers," not other entities in the transmission chain). Inexplicably, Qwest admits this in its Complaint, even going so far as to quote this passage in the same pleading in which it pursues access charges against non-IXC defendants alleged to have IXCs as customers. *See* Cmplt. ¶ 44. The FCC also clarified that even when multiple entities are involved in the transmission (as in this case), *only* "the interexchange carrier is obligated to pay terminating access charges." *AT&T Order*, 19 FCC Rcd. at 7470 ¶ 19.

While the *AT&T Order* addressed the application of access charges to an IP telephony service offered by a classic IXC, in this case Qwest attempts to break new ground by extending

liability beyond IXCs to non-IXC defendants like UniPoint. Qwest's effort to rewrite federal telecommunications law should be rejected, and its Complaint should be dismissed.

B. The Complaint's Vague and Conclusory Allegations Lack Facts Sufficient to State a Claim Based Upon IXC Liability

Qwest may argue that its Complaint states a claim because it may ultimately be able to discover and prove unalleged facts supporting an allegation that UniPoint or some other defendant actually is an IXC. The Supreme Court's *Twombly* decision forecloses that argument. Qwest's allegation is not merely ambiguous ("*acts* as an interexchange carrier") but baldly conclusory. Although Qwest could state a claim by alleging facts which, if proven, would show that UniPoint and the other defendants *are* IXCs that have received but not paid for access services, it has simply not included any such allegations in the Complaint. Thus, UniPoint (and the other defendants) are entitled to dismissal even if Qwest argues that its Complaint should be understood as seeking relief against IXCs.

In *Twombly*, the Supreme Court held that an antitrust complaint that alleged agreement but failed to allege any facts plausibly suggesting agreement should be dismissed pursuant to Rule 12(b)(6). *See* 127 S.Ct. at 1961. The Court explained that the pleading standard provided by Rule 8(a) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 1965 n.3. Just as a "conclusory allegation of agreement at some unspecified point" made no showing of the agreement element necessary for the *Twombly* plaintiff to state a claim, *id.* at 1966, a bare allegation that the defendants all "act" as IXCs "[b]ecause they participate" in the services makes no showing of the IXC element necessary to state an access-charge claim.

Qwest alleges no facts which, if proven, would show UniPoint (or any other defendant) to be an IXC. While the Court must read the factual allegations in the light most favorable to the

Plaintiff, it cannot assume the Plaintiff can prove facts which it has completely failed to allege. *Associated Gen. Contractors of Cal.*, 459 U.S. at 526. And, after *Twombly*, Qwest cannot survive a motion to dismiss by speculating it might adduce evidence that one or more defendant is an IXC and arguing "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see Twombly*, 127 S.Ct. at 1968-69 (announcing the "retirement" of this aspect of *Conley v. Gibson*); *see also Green v. United Steel Workers Int'l*, No. CV-07-5066-RHW, 2008 U.S. Dist LEXIS 23286 at *6 n.1 (E.D. Wash. March 7, 2008) (noting *Twombly*'s abrogation of *Conley* formulation of 12(b)(6) standard). Rather, "[f]actual allegations must be enough to raise a right to relief above the speculative level,"—a standard the plaintiff can meet only by pleading "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S.Ct. at 1965, 1974.

Another district court considered an analogous complaint in *Dell, Inc. v. This Old Store, Inc.*, No. H-07-0561, 2007 U.S. Dist. LEXIS 47818 (S.D.Tex. July 2, 2007). There the court considered a complaint riddled with allegations made upon "information and belief," in which "few paragraphs ma[de] any distinction among the thirty-four Defendants." *Id.* at *8. The complaint charged defendants with using Dell's name in a way that falsely suggested some Dell affiliation or endorsement, but it failed to distinguish the roles any of the defendants were alleged to have played or any factual basis for these generalized allegations against the defendants as a group. *Id.* at *9. The complaint then concluded with formulaic recitations of the elements of the various causes of actions pled, incorporating the preceding generalized allegations by reference. *Id.* The court granted defendants' motion to dismiss, concluding that "[t]hese 'labels and

conclusions' and formulaic recitations of the elements of a cause of action in a complex commercial case are inadequate under *Twombly*." *Id.* at *10.

Where, as here, a complaint reveals "a plaintiff with a largely groundless claim" which threatens to "take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value," the fact that "the allegations... however true, could not raise a claim of entitlement to relief" is a "basic deficiency [which] should... be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 127 S.Ct. at 1966 (citations and internal quotation marks omitted). Qwest's Complaint must therefore be dismissed.

V. Qwest's State Law Claims Fail Pursuant to the Filed-Rate Doctrine

The filed-rate doctrine—a "tough and durable barrier" to state-law claims deriving from allegations of non-compliance with filed tariffs, *see Verizon Del., Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1088 (9th Cir. 2004)—bars Qwest's state-law claims for unjust enrichment (Count III), tortious interference (Count IV), and fraud (Count V). Pursuant to the doctrine, a filed tariff preempts state-law claims because the tariff itself is "considered to be 'the law' and to therefore 'conclusively and exclusively enumerate the rights and liabilities' as between the carrier and the customer." *See Davel Commc'ns., Inc. v. Qwest Corp.*, 460 F.3d 1075, 1084 (9th Cir. 2006) (quoting *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000)); *see also AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 230 (1998) (Rehnquist, C.J., concurring) (confirming that the tariff itself provides "the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff").

The filed-rate doctrine applies even when a defendant argues (as UniPoint does in this case) that it is not subject to the tariff under any circumstances. This is because "[t]he filed rate

doctrine turns upon an examination of the claim, not the asserted defenses." *Freedom Ring Commc'ns, LLC v. AT&T Corp.*, 229 F. Supp. 2d 67, 69-70 (D.N.H. 2002). In other words, regardless of a defendant's arguments, the doctrine applies as long as the state-law claims are "primarily founded upon the contention that [the defendant] failed to pay [the plaintiff] for services rendered under its filed tariffs." *Id.* at 70.

In this case, each of Qwest's state-law claims relies directly on the defendants' alleged failure to pay access charges pursuant to Qwest's tariffs. *See* Cmplt. Counts III, IV and V. Because the filed-rate doctrine bars these state-law claims, the Court must dismiss them. *See Cent. Office*, 524 U.S. at 235 (doctrine bars state-law claim for breach of contract and derivative claim for tortious interference).

VI. In the Alternative, the Court Should Defer to the Primary Jurisdiction of the Federal Communications Commission

As explained in Section IV above, Qwest does not allege that UniPoint is an IXC or a common carrier, and its claim that UniPoint is liable for the payment of access charges therefore fails as a matter of law. Reading its vague Complaint charitably, it is possible that Qwest is suggesting that despite the clear language of the FCC's access-charge rule, entities other than IXCs should be required to pay access charges. To the extent Qwest is asking this Court to adopt its novel theory of access-charge liability, this is the wrong forum. The Court should decline Qwest's invitation to make federal communications policy and defer instead to the primary jurisdiction of the FCC.

A. The Primary Jurisdiction Doctrine

Under the primary jurisdiction doctrine, a court may dismiss or stay a proceeding that is otherwise cognizable if resolution of the dispute requires a determination from an expert agency

with special competence over the subject matter. *See Clark v. TWC*, 523 F.3d 1110, 1114 (9th Cir. 2008). The doctrine is prudential, and should be invoked for cases in which a claim "requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002). Thus, the primary jurisdiction doctrine ensures the proper balance between the judicial and executive branches and protects "the integrity of a regulatory scheme [by] dictat[ing] preliminary resort to the agency which administers the scheme." *Id.* (quoting *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987)). Courts should invoke the primary jurisdiction doctrine in any instance where a regulatory scheme is too uncertain or formative for the court to apply it.

While there is no "fixed formula" for applying the primary jurisdiction doctrine, *see Davel Commc'ns,* 460 F.3d at 1086 (9th Cir. 2006), courts in this circuit "traditionally examine" four factors: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration. *See Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) (citing *Gen. Dynamics*, 828 F.2d at 1362). The Ninth Circuit has explained that the FCC "is such an agency," *see Clark*, 523 F.3d at 1115, and the novel theories of liability that Qwest appears to advance raise complex and interrelated policy questions that fall squarely within the FCC's expertise and authority.

As discussed in detail below, if this Court were to credit Qwest's novel access-charge arguments, it would necessarily insert itself into federal communications policymaking, and

likely supplant the expert executive agency in the midst of its comprehensive deliberative process on access charges. Until the FCC issues new rules, there simply is no law on which Qwest could rely, or the Court could interpret, to impose access charges on non-IXCs.

B. Qwest's Requested Relief Cannot Be Granted Without FCC Action

The factual vagueness of Qwest's Complaint makes it difficult to understand the precise theory under which it would hold UniPoint liable for access-charge payments without alleging it to be an IXC.[10] Nonetheless, it is plain that imposing liability on UniPoint would require this Court to resolve issues currently pending before the FCC by embracing a significant transformation of existing law. Indeed, Qwest's own advocacy at the FCC demonstrates that FCC rulemaking is necessary to impose access-charge liability on UniPoint and similar providers.

The issues raised by Qwest in this lawsuit are currently pending before the FCC in a number of open proceedings. First, the FCC has before it a Petition for Declaratory Ruling (the "Declaratory Ruling Proceeding") arising from a primary jurisdictional referral of virtually identical claims by another ILEC. In that litigation, SBC (now AT&T), like Qwest here, alleged

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[10] Qwest relies at least in part on the constructive ordering doctrine. *See* Cmplt. ¶ 21. Application of this doctrine provides yet another ground for deferring to the FCC's primary jurisdiction, as application of the doctrine would require the Court to analyze several "complex legal and technical question[s] . . . best addressed in the first instance by the FCC." *Advamtel, LLC v. Sprint Commc'ns Co.*, 125 F. Supp. 2d 800, 804 (E.D.Va. 2001) (referring predicate constructive-ordering determinations to the FCC). Among other things, a constructive ordering analysis would require the Court to assess whether UniPoint was among the universe of entities legally required to pay access charges (*i.e.*, IXCs); whether UniPoint has received access services (as opposed to services provided to non-IXCs); whether it should have expected to receive tariffed access services in light of the interconnection relationship at issue; and, if access tariffs did apply and UniPoint should have known they applied, whether UniPoint undertook appropriate technical steps and other measures to avoid receiving Qwest's tariffed access services. *See, e.g., Atlantic Telco, Inc. and Tel & Tel Payphones, Inc., Request for Declaratory Ruling*, Order, 8 FCC Rcd. 8119 (1993) (explaining constructive ordering doctrine).

that UniPoint and co-defendant Transcom were liable for access charges. The District Court recognized that it could not find that UniPoint was liable unless it determined that UniPoint was an IXC or that access charges may be assessed against entities other than IXCs, explaining that "[t]he first is a technical determination far beyond the Court's expertise; the second is a policy determination currently under review by the FCC." *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303, slip op. at 8 (E.D. Mo. Aug. 23, 2005) (copy attached as Exhibit B). The District Court recently reaffirmed its referral decision, explaining that "all of the reasons for deferring to the primary jurisdiction of the FCC remain in place." *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303, slip op. at 4 (E.D. Mo. Nov. 10, 2008) (copy attached as Exhibit C).

Qwest's own advocacy before the FCC in the Declaratory Ruling Proceeding confirms that affirmative FCC rulemaking action is necessary to impose access-charge liability on providers like UniPoint and highlights the complex and unresolved policy issues raised by Qwest's Complaint. In its Comments to the FCC, Qwest explained that the Declaratory Ruling Proceeding raised the "broad[] issue of who is liable in multi-carrier access traffic flows." *Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, FCC, WC Docket No. 05-276, Comments of Qwest Communications International Inc. at 12 (filed Nov. 10, 2005) ("Qwest Comments") (copy attached as Exhibit D). Qwest urged the FCC to "expound upon the broader multi-carrier liability issues implicated" by the primary jurisdiction referral. *See id.* at 15.[11] Qwest then offered the FCC extensive

[11] Granting carriers like Qwest the power to allocate liability among other (often competing) providers offers yet another basis for deferring to the primary jurisdiction of the FCC. Any liability rule must be carefully crafted to ensure that (1) ILECs cannot double recover by charging multiple providers access charges for a single call and (2) ILECs cannot recover

argument in favor of its preferred liability rules, *see id.* at 15-24, provided multiple theories for how UniPoint "could" be liable under Qwest's preferred liability rules, *see id.* at 5, and requested "express[] limit[s]" on the scope of its preferred liability rules. *Id.* at 23-24.

Qwest's Reply Comments in the same proceeding, which summarize and argue against the many other proposed liability schemes other commenters offered to the FCC, again confirm the absence of existing liability rules in this context and highlight the complex policy choices raised by claims like Qwest's that providers like UniPoint are liable for access charges. *See Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, FCC, WC Docket No. 05-276, Reply Comments of Qwest Communications International Inc. at 12 (filed Dec. 12, 2005) (copy attached as Exhibit E). The Declaratory Ruling Proceeding is still pending at the FCC, and this Court should defer to its primary jurisdiction with respect to the liability issues Qwest has already briefed at the Commission and implicitly re-raised in its Complaint here.

Separately, in 2004 the Commission opened a comprehensive rulemaking (the "IP-Enabled Services Proceeding") to address the "revolutionary" changes wrought "by the rise of IP-enabled communications." *See IP-Enabled Servs.*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, 4867 ¶ 5 (2004). As part of this proceeding, the FCC has stated that it must consider numerous policy issues such as promoting the economically efficient use of (and investment in) telecommunications networks, *see id.* ¶ 31, encouraging efficient competition, *see id.* ¶ 31, preserving universal service, *see id.* ¶ 32, encouraging technological neutrality, *see id.* ¶ 33,

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different amounts from similarly situated providers in violation of the statutory prohibition of "unjust or unreasonable discrimination in charges . . . for or in connection with like communication service." 47 U.S.C. §202(a).

reviewing the effect of compensation changes on carrier interconnection rules, *see id.* ¶ 34, and developing a transition plan for carriers to implement any new compensation rules. *See id.* ¶ 36.

Among the many questions raised by that rulemaking is the applicability of access charges to IP-enabled services, including the appropriate intercarrier-compensation obligations of "providers of [IP-enabled] services" that "are not classified as interexchange carriers." *Id.* ¶ 61. Since initiating this rulemaking, the FCC has steadily addressed many of the difficult issues it raised.[12] It has not, however, extended or altered the existing access charge rule, which imposes access charges only on IXCs.

Just last year, the Ninth Circuit affirmed a primary jurisdiction referral of issues raised in the IP-Enabled Services Proceeding, explaining that "the agency's development of a uniform regulatory framework to confront . . . emerging technology is important to federal telecommunications policy" and noting that the Court had "previously approved of the use of the primary jurisdiction doctrine where it is unclear whether a federal statute applies to a new technology." *Clark*, 523 F.3d at 1115. This Court should likewise decline Qwest's invitation to

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[12] For example, the Commission has determined that interconnected Voice-over-Internet-Protocol providers (a subset of IP-enabled service providers) must provide E911 service, *see E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 10245 (2005); comply with the requirements of the Communications Assistance for Law Enforcement Act, *see Commc'ns Assistance for Law Enforcement Act and Broadband Access and Servs.*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 14989, 14991-92 ¶ 8 (2005); pay into the federal Universal Service Fund, *see IP-Enabled Servs.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, 7520 ¶ 2 (2005); safeguard Customer Proprietary Network Information, *see Implementation of the Telecomm. Act of 1996: Telecomms. Carriers' Use of Customer Proprietary Network Info. and Other Customer Info.*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 6927 (2007); satisfy disability access requirements, *see IP-Enabled Servs.*, Report and Order, 22 FCC Rcd. 11275 (2007); meet the FCC's regulatory fee obligations, *see Assessment and Collection of Reg. Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-140 at ¶¶ 11-20 (rel. Aug. 6, 2007); and comply with local number portability requirements. *See Tel. Number Requirements for IP-Enabled Servs. Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd. 19531 (2007).

further complicate the regulatory questions already pending before the FCC by adopting a theory of liability that the FCC has expressly considered and, thus far, declined to adopt. Instead, if the Court does not dismiss Qwest's Complaint outright, it should defer to the FCC's primary jurisdiction with respect to the difficult policy questions raised by Qwest's overbroad assertion of liability.

Even if this case did not raise thorny policy questions that Qwest has already brought to the FCC, deferral to the primary jurisdiction of the FCC would be appropriate. The FCC is actively considering the appropriate regulatory treatment of IP services with respect to access charges. The month before this Complaint was filed, the FCC released a Further Notice of Proposed Rulemaking ("FNPRM") seeking comment on several intercarrier compensation proposals, "including proposals that would address the regulatory classification of calls exchanged between IP-based and circuit-switched networks."[13] The formal comment period on the FNPRM closed on December 22, 2008, and the FCC may act on its proposals at any time. The FCC also faces an April 11, 2009 statutory deadline for action on a forbearance petition that concerns the applicability of access charges to "IP-based voice service providers" that could address issues raised by Qwest in its Complaint. *See Petition of the Embarq Local Operating Companies for Limited Forbearance*, Order, WC Docket No. 08-8, 2009 FCC LEXIS 56 (rel. Jan. 9, 2009) (identifying statutory deadline).

There is further evidence that the FCC may act in the near term to resolve issues raised by Qwest's Complaint. Qwest characterizes the issues raised in the Declaratory Ruling

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[13] *See High-Cost Universal Serv. Support,* Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 2008 FCC LEXIS 7792 (rel. Nov. 5, 2008) ("*FNPRM*"); *see also Feature Group IP Petition for Forbearance*, Memorandum Opinion and Order, FCC, WC Docket No. 07-256, ¶ 6 n.19 (rel. Jan. 21, 2009).

Proceeding as "a particular flavor of . . . 'phantom traffic.'" Qwest Comments at 2. In a November 5, 2008 statement concerning the FCC's effort to adopt comprehensive intercarrier compensation reform, four FCC Commissioners (including the current Chairman and both remaining sitting Commissioners) identified phantom traffic as an area of "growing . . . consensus" and expressed their "commitment to comprehensive reform of the intercarrier compensation and universal service systems in an expedited fashion." *See FNPRM* at *74 (Commissioners' Joint Statement). The Court should permit the FCC to consider and resolve these policy issues in the first instance by deferring to its primary jurisdiction.

Conclusion

For the foregoing reasons, UniPoint respectfully requests that the Court dismiss Qwest's Complaint in its entirety for failure to state a claim against UniPoint. In the alternative, UniPoint requests that the Court dismiss in deference to the primary jurisdiction of the FCC.

Dated this 6th day of February 2009.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION, Plaintiff, vs. ANOVIAN, INC., et al. Defendants.	Case No. 2:08-cv-01715-RSM

[Proposed] Order

For good cause shown, the UniPoint Defendants' Motion to Dismiss or, in the Alternative, Defer to the Primary Jurisdiction of the Federal Communications Commission is hereby GRANTED, and Plaintiff Qwest Corporation's Complaint is hereby DISMISSED.

Dated this __ day of _____, 2009.

_____
The Honorable Ricardo S. Martinez
UNITED STATES DISTRICT JUDGE

Harris, Wiltshire & Grannis LLP
1200 18th Street, NW, Washington, DC 20036
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February 2009, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Charles Breckinridge

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EXHIBITS

Exhibit A.	Affidavit of J. Michael Holloway
Exhibit B.	*Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303, slip op. (E.D. Mo. Aug. 23, 2005)
Exhibit C.	*Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303, slip op. (E.D. Mo. Nov. 10, 2008)
Exhibit D.	*Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, FCC, WC Docket No. 05-276, Comments of Qwest Communications International Inc. at 12 (filed Nov. 10, 2005)
Exhibit E.	*Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, FCC, WC Docket No. 05-276, Reply Comments of Qwest Communications International Inc. at 12 (filed Dec. 12, 2005)

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Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Case No. 2:08-cv-01715-RSM

QWEST CORPORATION,

Plaintiff,

v.

ANOVIAN, INC.; BROADVOX, INC.; BROADVOX, LLC; BROADVOXGO!, LLC; TRANSCOM HOLDINGS, INC.; TRANSCOM ENHANCED SERVICES, INC; MASKINA COMMUNICATIONS, INC. (f/k/a TRANSCOM COMMUNICATIONS, INC.); UNIPOINT HOLDINGS, INC.; UNIPOINT ENHANCED SERVICES, INC. (d/b/a "POINT ONE"), UNIPOINT SERVICES, INC.,

Defendants.

QWEST'S CONSOLIDATED OPPOSITION BRIEF TO DEFENDANTS' MOTIONS TO DISMISS

NOTE ON MOTION CALENDAR: May 8, 2009

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EXHIBIT

"A-14"

Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Case No. 2:08-cv-01715-RSM

QWEST CORPORATION,

Plaintiff,

v.

ANOVIAN, INC.; BROADVOX, INC.; BROADVOX, LLC; BROADVOXGO!, LLC; TRANSCOM HOLDINGS, INC.; TRANSCOM ENHANCED SERVICES, INC; MASKINA COMMUNICATIONS, INC. (f/k/a TRANSCOM COMMUNICATIONS, INC.); UNIPOINT HOLDINGS, INC.; UNIPOINT ENHANCED SERVICES, INC. (d/b/a "POINT ONE"), UNIPOINT SERVICES, INC.,

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I. INTRODUCTION

On November 26, 2008, Qwest Corporation ("Qwest") filed its complaint in this action. Complaint, Dkt. No. 1 (Nov. 26, 2008) [hereinafter *Complaint*]. As Qwest articulated in that Complaint, the Defendants[1] in this lawsuit are each engaged in what can best be described as telecommunications "traffic laundering." Each Defendant is taking long-distance telephone calls and causing them to be sent to Qwest disguised as local telephone calls. This is significant, because the tariffed charges that Qwest imposes to complete long-distance calls are higher than the charges that Qwest imposes and collects to complete local calls. This difference between the Qwest rates that apply to the termination of long-distance versus local calls also explains why the Defendants disguise these calls as local calls. By passing off long-distance traffic in the guise of local traffic, Defendants engage in a profitable arbitrage scheme.

Further, because the Defendants have caused these long-distance calls to appear to be local calls, Qwest cannot and does not know the full scope of the long-distance traffic so disguised by each Defendant, or any of the detailed facts regarding these calls. Qwest knows only that it is receiving this traffic, that it is long-distance traffic, and that it is being sent by each of the Defendants. Qwest is not privy to the details regarding the arrangements between each Defendant and the various other interexchange carriers ("IXCs") with whom these Defendants deal. Qwest does not and cannot know, without discovery, from which IXCs Defendants are taking long-distance traffic, how they are doing so, where they are doing so, what representations

[1] Qwest will refer to Broadvox, Inc., Broadvox, LLC and BroadvoxGo!, LLC as "Broadvox" or the "Broadvox Defendants." Qwest will refer to Transcom Holdings, Inc. and Transcom Enhanced Services, Inc., as "Transcom" or the "Transcom Defendants." Qwest will refer to UniPoint Holdings, Inc., UniPoint Enhanced Services, Inc. (d/b/a "Point One") and UniPoint Services, Inc. as "UniPoint" or the "UniPoint Defendants." Qwest will collectively refer to Anovian, Inc. ("Anovian"), Broadvox, Transcom, and UniPoint as "Defendants." Defendant Maskina Communications, Inc. has been dismissed from this case by a February 4, 2009 Rule 41(a)(1)(a)(i) Notice of Dismissal filed by Qwest (Dkt. No. 40).

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Defendants make regarding their ability to transport and terminate that long-distance traffic, or what payments, terms and conditions govern those transactions. In like fashion, Qwest does not and cannot know, without discovery, how and where the Defendants are handing this traffic to competitive local exchange carriers ("CLECs"), to which various CLECs or other entities Defendants forwarded such traffic, what representations are made in that regard, or what payment terms and conditions govern those transactions.

Each of these factual questions is critical to fully understanding the details and scope of these Defendants' long-distance traffic laundering scheme. That does not mean, however, as Defendants would have this Court believe, that Qwest's Complaint is deficient because Qwest has been unable to divine all of the factual detail underlying each of the Defendant's fraudulent schemes. What Qwest does know and allege – that each of Defendants sent to Qwest long-distance traffic disguised as local traffic – is sufficient to state a claim. Defendants, in fact, do not dispute that they sent this traffic to Qwest, but instead present diversionary arguments relating to what charges may be owed on this traffic, and by whom.

The law that applies to charges for the termination of long-distance calls is settled and straightforward. As Qwest has alleged, and as is indisputable, access charges apply to long-distance calls that originate and terminate on the Public Switched Telephone Network ("PSTN"). This is true even if, at some point in the transmission path, these calls are temporarily converted to Internet Protocol ("IP") format. The Federal Communications Commission ("FCC") unmistakably so held in the IP-in-the-Middle docket, as outlined by Qwest in its Complaint and explained in greater detail herein.[2] *Complaint* at 16, line 9 – 17, line 18. Even UniPoint

[2] Order, *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd. 7457 (2004) (attached as Exhibit A) [hereinafter *IP-in-the-Middle Order*].

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acknowledges this essential truth. UniPoint Motion to Dismiss, Dkt. No. 44, at 5, lines 5-7 (filed Feb. 6, 2009) [hereinafter *UniPoint Mot.*] ("Qwest (like other ILECS) receives "access charge" payments under federal law when it originates or terminates PSTN long-distance calls carried by IXCs . . . .").

What Defendants are really arguing in their various motions is that, while access charges may apply to the calls at issue here, Defendants cannot be the parties responsible to pay these charges because they are not IXCs. The correct question, however, is not whether these Defendants "are" IXCs at all times for all purposes, bur rather, whether they act as IXCs with regard to *this* specific conduct and *these* specific calls. Whether these Defendants are Enhanced Service Providers ("ESPs") in some other context, such that they are not required to pay access charges in that context, is irrelevant here. Qwest has adequately pled that these Defendants carry ordinary long-distance calls between telephone exchanges, and are accordingly an integral part of providing interexchange service. That is all that is necessary for them to be IXCs for purposes of these calls.

In any event, this is a fact-based determination driven *not* by whatever labels Defendants may apply to themselves, but by the nature of their conduct and the traffic they are carrying. That factual issue cannot be determined against Qwest in a motion to dismiss, and Qwest is entitled to discovery to support its allegation that Defendants act as IXCs in their carriage of the calls at issue here. Further, there is no need for FCC guidance on this issue either, and therefore no basis to refer this matter to the FCC under the doctrine of primary jurisdiction, as the law is well-established on this point. If the Defendants act as IXCs in carrying these long-distance calls into Qwest's local exchanges for termination, then they are subject to access charges.

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Based on the Defendants' fraudulent scheme, Qwest's Complaint asserts claims for non-payment of federally tariffed access charges (Count I), non-payment of state tariffed access charges (Count II), unjust enrichment (Count III), tortious interference with contractual relationship or business expectancy (Count IV), and fraud (Count V) against each of the named Defendants. Qwest's Complaint also seeks a declaratory judgment (Count VI) determining that the long-distance traffic that the Defendants cause to be routed to Qwest for termination is subject to the terminating access charges provided in Qwest's federal and state tariffs. As previously noted, on February 4, 2009, Qwest filed a Fed. R. Civ. P. 41(a)(1)(A)(i) Notice of Dismissal dismissing Defendant Maskina Communications, Inc., from the case (Dkt. No. 40).

On February 6, 2009, each of the remaining Defendants filed a variety of motions to dismiss Qwest's claims, and also generally joined in each other's respective motions to dismiss. Pursuant to the Court's February 24, 2009 Order establishing a briefing schedule (Dkt. No. 54), Qwest now files its consolidated brief in opposition to Defendants' various motions to dismiss. Each of the Defendants, save for UniPoint, joins in a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. In addition, each of the Defendants joins in a Rule 12(b)(6) motion to dismiss or stay this action based on the doctrine of primary jurisdiction, a Rule 12(b)(3) motion to dismiss asserting improper venue, or alternatively seeking a transfer of venue pursuant to 28 U.S.C. § 1404(a), a Rule 9(b) motion to dismiss Qwest's fraud claim, various Rule 12(b)(6) motions to dismiss Qwest's claims on a variety of theories, and a Rule 12(e) motion for a more definite statement.

Qwest will respond to each of these motions in turn. At the outset, however, it is important to observe that the common thread asserted by these multiple motions is that Defendants cannot be liable to Qwest under any theory, notwithstanding the fact that it is the

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Defendants' intentional acts, and their traffic-laundering scheme, that have undercut Qwest's ability to be paid its access charges for ordinary long-distance telephone traffic. As per Qwest's Complaint it is undisputed, as it must be for purposes of these motions, that *but for* the Defendants' purposeful and intentional intervention in the flow of the calls at issue in this case, these calls would have been readily identified by Qwest as ordinary long-distance calls. It is undisputed that, but for the Defendants' intervention in the flow of these calls, Qwest would have assessed and been paid its tariffed access charges for terminating these calls to end users. It is undisputed that Defendants short-circuited the normal flow of these long-distance calls by causing them to be diverted to Qwest facilities limited to local traffic, as opposed to long-distance traffic. It is undisputed that the masking of these ordinary long-distance calls as local calls caused Qwest to identify and bill these calls as local calls, at a lower rate than they should have been billed as long-distance calls.

Defendants do not dispute that they caused this long-distance traffic to be sent to Qwest; yet they maintain that there is no legal theory by which *they* can be held responsible for this conduct. Qwest contends otherwise, as explained in detail herein, but also contends that Defendants, in any event, cannot so easily evade responsibility for their conduct. Even were it true that Defendants cannot be made to pay Qwest's access charges, the fact remains that it was still the Defendants' conduct that damaged Qwest, by causing Qwest to be unable to assess and collect its access charges. Even if Defendants are correct that Qwest must look to others for payment of its access charges, it is the Defendants' fraudulent scheme, and resulting tortious interference with the ordinary flow of the long-distance calls at issue, which prevented Qwest from doing just that.

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II. BACKGROUND ON VOICE COMMUNICATIONS

In order to address Defendants' various motions, and the access charge regime that applies to long-distance traffic, it is first necessary to provide some basic background relating to the public switched telephone network ("PSTN") and voice communications. As Qwest stated in its Complaint, the telephone traffic at issue in this lawsuit is ordinary long-distance traffic that was originated on the PSTN, and was terminated on the PSTN. *Complaint* at 15, lines 2-6. The fact that Defendants may have utilized IP to transport this traffic somewhere in the call path does not alter this critical fact. Importantly, as explained herein, the traffic at issue here is not so-called VoIP ("Voice over Internet Protocol") traffic, and it did not originate in IP-format. *Complaint* at 15, lines 2-7. All of the calls for which Qwest seeks compensation began as ordinary long-distance calls initiated over the PSTN. *Id.*

Historically, all real-time voice communications were provided exclusively through the PSTN. The PSTN is comprised of a vast number of distinct local exchange networks that are connected regionally, nationally, and internationally through long-distance networks. Each local exchange network is owned and operated by a local exchange carrier ("LEC"). For instance, Qwest is a LEC that owns and operates local exchange networks in the State of Washington as well as in thirteen other states. *Complaint* at 5, lines 12-14. In general, a local exchange network is comprised of, among other things, "the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches)" that connect the switches in the local exchange network. *E.g., Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Com'n*, 461 F.Supp.2d 1055, 1058 (E.D. Mo. 2006).

Long-distance networks provide the connectivity between local exchange networks, allowing subscribers connected to one local exchange network to call subscribers connected to

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another local exchange network. Long-distance carriers and are often referred to as interexchange carriers or "IXCs."

The LECs that have originated and terminated a long-distance call are compensated for the use of their local exchange networks through originating and terminating access service charges, respectively.[3] The access charges are specified in the LEC's tariffs approved by the FCC and the various state regulators. Qwest has approved Access Service tariffs, or analogous price lists or catalogs, that it has filed with the FCC and in each of its fourteen states.[4] *Complaint* at 18, lines 1-2 & 19, lines 1-4.

Within the PSTN, the transmission of telephone calls occurs utilizing "circuit-switched" communications technology. "In circuit-switched communications, an electrical circuit must be kept clear of other signals for the duration of a telephone call." *Minn. Pub. Util. Com'n. v. FCC*, 483 F.3d 570, 574 (8th Cir. 2007). In recent years, however, IP communications have begun to supplement and replace portions of the circuit-switched PSTN to provide voice communications. IP communications technology utilizes "packet-switching" networks to transmit voice communications. IP communications "travel in small digital packets along with many other packets, allowing for more efficient utilization of circuits." *Id.* Voice communications can be provided exclusively with IP or in combination with the PSTN. The latter scenario is the focus of this case.

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[3] *See, e.g.*, Memorandum Opinion & Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 2 (1983); Order on Remand & Report & Order & FNPRM, *High-Cost Universal Support*, FCC 08-262, WC Docket No. 05-337 *et al.*, 2008 WL 4821547, Appendix A, ¶ 165 (Nov. 5, 2008) [hereinafter *Nov. 5, 2008 FNPRM*]; *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1129 (D.C. Cir. 1984) (reviewing FCC decisions relating to access charges assessed on carriers).

[4] *See also* Qwest, Effective Tariff Library, http://tariffs.qwest.com:8000/Q_Tariffs/QT_Tariff_State_Page/index.htm (last visited Apr. 12, 2009) (providing Qwest's tariffs, price lists, and catalogs for the various states).

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For regulatory purposes, the FCC has distinguished between two categories of voice communications that combine IP communications technology and the PSTN: 1) Interconnected Voice over IP ("Interconnected VoIP") calls and 2) IP-in-the-Middle calls. First, an Interconnected VoIP call either originates *or* terminates over the end-user's broadband connection through the use of IP-compatible customer premises equipment while connecting to the PSTN for either termination *or* origination. *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1236 (D.C. Cir. 2007) ("Interconnected VoIP services '(1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN. . . .'"). To be clear, *none* of the long-distance calls for which Qwest is seeking payment of access charges in this case were Interconnected VoIP calls. This is not a VoIP telephony case. This case only involves long-distance calls that have originated *and* terminated on the PSTN. Qwest, in its Complaint, explicitly excluded Interconnected VoIP calls from its claims. *Complaint* at 15, lines 2-7.

Second, IP-in-the-Middle long-distance calls originate *and* terminate on the PSTN and utilize the local exchange network of the called and calling parties in the same manner as a traditional, circuit-switched long-distance call.[5] In an IP-in-the-Middle call, IP communications technology is merely used as a transport technology to transmit the call between local exchanges on the PSTN. The call *originates as a circuit-switched call* on the PSTN, undergoes a

[5] *IP-in-the-Middle Order*, *supra* note 2, ¶ 11. *See also* Declaratory Ruling & Report & Order, *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd. 7290, ¶ 18 (2006). ("[A]n interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology' is a telecommunications service." (citations omitted)) (attached as Exhibit B) [hereinafter *Calling Card Order*].

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conversion to IP, is transported between local exchanges, and then is *converted back to a circuit-switched call* for termination on the PSTN.

This distinction between Interconnected VoIP calls and ordinary long-distance calls with an IP-in-the-Middle component is critical, for purposes of considering the Defendants' various motions to dismiss, and in particular, Defendants' motion to dismiss or stay this proceeding in deference to the primary jurisdiction of the FCC. As explained in more detail herein, the FCC has definitively ruled, and reaffirmed repeatedly, that IP-in-the-Middle calls are subject to access charges. Because the FCC has resolved that pivotal issue, there is no agency guidance that this Court need await, nor is any likely to be forthcoming. All the Court need do here is apply this well-established rule of law. Ordinary circuit-switched long-distance calls do not avoid access charges simply because they are "touched" by IP somewhere in the middle of the transmission path. The FCC has squarely rejected this "magic wand" theory as to IP-in-the-Middle transport of long-distance calls.

While Defendants fire a few broadsides at the current access charge regime, UniPoint, at least, recognizes that, whatever its alleged shortcomings, the access charge regime remains in full force today. UniPoint acknowledges that: "'Access charges' are the federally mandated fees that some types of communications companies pay to local phone companies for the privilege of routing calls over the local phone company's lines." *UniPoint Mot.* at 1, lines 9-11. Indeed, the access charge regime applies to all of the long-distance calls at issue, and for which Qwest seeks to recover damages, in this lawsuit, and it will likely continue to apply for the foreseeable future. While the FCC may yet tackle the issue of reforming the current intercarrier compensation

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regime,[6] including access charges, any changes implemented will be *prospective* only, and will not change the fact that there exists, today, a well-established rule of law requiring that access charges be paid on IP-in-the-Middle long-distance calls. Defendants seek to divert the Court's attention from this inarguable fact by pointing to what *may* happen at the FCC, but that cannot alter the established rule of law that applies to the calls *already* at issue in this lawsuit.

With that, Qwest now turns to the various motions and arguments presented by Defendants, beginning with Defendants' contention that Qwest's Complaint should be dismissed because it does not meet the basic pleading standards required by Rule (8)(a)(2).

III. *TWOMBLY* HAS NOT CHANGED THE ESSENTIAL CHARACTER OF THE PLEADING STANDARD UNDER FED. R. CIV. P. 8(a)(2)

Qwest's Complaint readily meets the pleading standard required under Rule 8(a)(2), requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (May 21, 2007), the Supreme Court indeed stated that the oft-quoted "no set of facts" pleading standard from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) had "earned its retirement," but this was far from the seismic shift in the Rule 8(a)(2) pleading requirements suggested by Defendants. To begin with, *Twombly* was an antitrust case, and as the Court observed, that case presented: "the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act." 550 U.S. at 554-55. The Court's analysis fundamentally proceeded within that antitrust context. Further, the Court observed that it remained true that: "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations of the complaint." *Id.* at

[6] *See generally Nov. 5, 2008 FNPRM, supra* note 3.

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563. The Court went on to observe that *Conley* still "describe[s] the breadth of opportunity to prove what an adequate complaint claims . . . ." *Id.*

In fact, the Ninth Circuit, well after *Twombly* was decided, still quotes with approval the familiar "no set of facts" standard. *See Colwell v. Dep't of Health & Human Serv.*, No. 05-55450, 2009 WL 692047, at *6 (9th Cir. Mar. 18, 2009) ("A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle it to relief." (quotations omitted)). Indeed, the Supreme Court, despite "retiring" the *Conley* "no set of facts" phraseology, did not change the *essential character* of the pleading standard embodied in Rule 8(a)(2), which is all that is necessary to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See, e.g., Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 2200 (June 4, 2007) (Decided two weeks after *Twombly*, and reiterating the traditional proposition that "[s]pecific facts are not necessary; the statement 'need only give the Defendant fair notice of what the claim is and the grounds upon which it stands'").[7]

It has been, and remains, black letter law that, on a motion to dismiss, the Court "must accept all material allegations in the complaint as true and construe them in the light most favorable to [the plaintiff]." *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *Walter v. Drayson*, 538 F.3d 1244, 1247 (9th Cir. 2008) ("We construe the complaint . . . in the

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[7] *See also Balar Equip. Corp. v. VT Leeboy, Inc.*, No. 07-CV-403-PHX-EHC, 2007 WL 2461847, at *1 (D. Ariz. 2007):

> The Supreme Court recently retired the oft-quoted *Conley v. Gibson* language that long-defined the standard district courts were to apply when deciding motions to dismiss. *See Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1968 (2007). The Court, however, reiterated that the accepted pleading standard remains unchanged: 'once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.' *Id.* The Court further reminded district courts weighing a motion to dismiss to ask 'not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.' *Id.* at 1969 n.8 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974)). '[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.' *Id.* at 1965.

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light most favorable to the non-moving party, and we take the allegations and reasonable inferences as true.").

Based on a fair reading of the Complaint, Qwest has more than provided the Defendants with fair notice of the claims and the grounds upon which they stand. UniPoint argues that Qwest's Complaint is a "fact-free pleading," *UniPoint Mot.* at 3, lines 16-20, but even a cursory review of the Complaint demonstrates that this is sweeping hyperbole. UniPoint's real complaint appears to be that Qwest has not differentiated its factual pleadings on a defendant-by-defendant basis, and has not provided sufficient facts to UniPoint's satisfaction. UniPoint caps its argument by suggesting that "Qwest's Complaint thus has all the clarity of a Rorshach test." *Id.* at 2, line 26 – 3, line 1. The remainder of UniPoint's motion, however, demonstrates that it understands all too well the conduct that is at issue, and that it lacks no ability to craft legal arguments to address that conduct. Defendants, including UniPoint, knowingly and purposefully disguised long-distance traffic as local traffic; their subterfuge has limited Qwest's ability to gain a clear and complete picture of each Defendant's conduct, or the total scope of their fraud.

Nothing illustrates this more profoundly than the Affidavit of Dennis Barnes, President of Defendant Anovian (attached as Exhibit C) [hereinafter *Barnes Aff.*].[8] As Qwest has just learned from Anovian, all of the local circuits that Anovian ordered, including in Washington, were established to carry the traffic of Defendant UniPoint. *Barnes Aff.* ¶ 2. This underscores the difficulty that Qwest faces in gaining a complete and accurate picture of each Defendant's conduct, and demonstrates the lengths to which UniPoint, at least, will go to erase its fingerprints on this long-distance traffic. Qwest, as the victim of this fraudulent scheme to disguise long-

[8] Mr. Barnes' affidavit was provided to Qwest by counsel for Anovian on April 12, 2009.

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distance traffic as local traffic, and further, to mask the identity of the parties causing the traffic to be sent to Qwest, has pled what it can, and sufficiently so, with regard to this conduct. Discovery will drive additional facts to light, almost certainly revealing additional avenues by which Defendants are sending traffic to Qwest. If there is a Rorshach image here it is not one of Qwest's making, but rather, one created by the Defendants' misdirection and obfuscation.

IV. RESPONSE TO MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

All Defendants (save UniPoint) assert that this Court lacks personal jurisdiction to hear this case.[9] On a motion to dismiss for lack of personal jurisdiction, the Court must assume that the allegations in the complaint are true. *See, e.g., Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002). As the party seeking to invoke the jurisdiction of this Court, Qwest has carried its burden of demonstrating that the Court's exercise of personal jurisdiction over these Defendants is appropriate.

A. The Court Should Exercise Specific Jurisdiction Over the Defendants in this Case

As an initial matter, Qwest is not seeking to invoke the general jurisdiction of this Court, but rather the specific jurisdiction of the court relating to the Defendants' specific conduct as articulated in Qwest's Complaint. *See Data Disc., Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977). A court may exercise "limited" or "specific" personal jurisdiction depending upon "the nature and quality of the Defendant's contacts in relation to the cause of action," even if the court cannot exercise general jurisdiction over a defendant. *Data Disc., Inc.*, 557 F.2d at 1287. Accordingly, the Defendants' arguments that relate to their alleged lack of

[9] The UniPoint Defendants do not challenge Qwest's assertion of personal jurisdiction in Washington, but do join in the Broadvox Defendants' motion to transfer venue.

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general contacts within the state of Washington (*e.g.*, property owned, business offices, employees within the state, etc.) generally miss the mark.

Washington's long-arm statute provides for specific personal jurisdiction over nonresident defendants when, *inter alia*, the defendant transacts business or commits a tort within the state. *See* WASH. REV. CODE § 4.28.185(1)(a) & (b). Moreover, the Ninth Circuit utilizes a three-part test to determine whether due process allows for the exercise of specific jurisdiction: (1) the nonresident defendant must have purposefully availed itself of the privilege of conducting activities in the forum by some affirmative act or conduct; (2) the plaintiff's claim must arise out of or result from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. *See Roth v. Garcia Marquez*, 942 F.2d 617, 620-21 (9th Cir. 1991).

With respect to the first factor, the purposeful availment (or "purposeful direction") inquiry requires an evaluation of whether the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1485 (9th Cir. 1993) (citation omitted). This element may be satisfied if a Defendant has taken deliberate action within the forum state or if the Defendant has created continuing obligations to forum residents – it is *not* necessary for a Defendant to be physically present within, or have physical contact with, the forum state. *See Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995) (citations omitted). Furthermore, the sufficiency of the contacts is determined by the quality and nature of the defendant's activities, not the number of acts or mechanical standards. *See Walker v. Bonney-Watson Co.*, 823 P.2d 518, 521 (Wash. Ct. App. 1992) (citation omitted).

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Defendants claim that they do not engage in the "transaction of any business" in Washington, or have not "purposefully directed any activity whatsoever into Washington." Transcom Motion to Dismiss, Dkt. No. 47, at 11, lines 10-11 (filed Feb. 6, 2009) [hereinafter *Transcom Mot.*]; Broadvox Motion to Dismiss, Dkt. No. 48, at 5, line 25 – 6, line 1 (filed Feb. 6, 2009) [hereinafter *Broadvox Mot.*]. That is demonstrably untrue. As Qwest has pled, and as demonstrated in the affidavit of Karen Chandler Ferguson, attached hereto as Exhibit D [hereinafter *Ferguson Aff.*], each of the Defendants ordered local circuits within the state of Washington from the CLEC Electric Lightwave, Incorporated ("ELI"), now a wholly owned subsidiary of Integra Telecom, Inc. ("Integra").[10] *Ferguson Aff.* at 2, lines 1-2 & lines 10-14. Each of the Defendants used these local Washington circuits to route long-distance traffic to Qwest for termination within the state of Washington. *Id.* Qwest in fact terminated millions of minutes of long-distance traffic routed to it by Defendants to Qwest end user customers within the state of Washington, and Qwest has not been paid its tariffed access charges for terminating this traffic within the state of Washington. *Ferguson Aff.* at 3, lines 4-8 (Anovian); 3, lines 19-23 (Broadvox); 4, lines 15-19 (Transcom); & 5, lines 7-11 (UniPoint). Qwest's unpaid access charges for Washington terminated long-distance traffic total hundreds of thousands of dollars for the traffic so routed by each Defendant. *Id.* Moreover, the traffic that Defendants terminated in Washington is the very traffic (in part) that is the subject of this lawsuit, further buttressing

[10] In Ms. Ferguson's affidavit, the final four digits for each of these local circuits has been redacted out of an abundance of caution, in the event that there are any concerns regarding the proprietary nature of the full telephone numbers associated with these circuits. The first three digits of each such telephone number are sufficient to demonstrate that those circuits are local circuits within the state of Washington. Specifically, the North American Numbering Plan Administration ("NANPA") divides the area served by the North American Numbering Plan (including the entire United States) into smaller Numbering Plan Areas, or "NPAs," each identified by a 3-digit NPA Code. These NPA Codes are more commonly known as "area codes." Per the NANPA website (http://www.nanpa.com), the following NPAs are associated with telephone numbers within the state of Washington: 206, 253, 360, 425 and 509. NANPA, Area Codes Map – Washington, http://www.nanpa.com/area_code_maps/display.html?wa (last visited Apr. 12, 2009) (attached as Exhibit E).

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this Court's assertion of specific jurisdiction to address this conduct pursuant to WASH. REV. CODE § 4.28.185(1)(a) & (b).

In addition, publicly available information included in the Broadvox Defendants' own marketing materials belie the claim that they have not purposefully directed any activities into Washington. For instance, Broadvox has posted a map of its North American Network Assets on its website.[11] Included among these assets are switching centers located within a handful of major American cities, *including* a switching center in Seattle. Also included on the Broadvox website is a list of "available rate centers" in the United States, including approximately 175 rate centers in the state of Washington.[12]

The second element of the specific jurisdiction test requires that plaintiff's claim arise out of, or result from, the defendant's forum-related activities. *See Roth*, 942 F.2d at 620-21. The Ninth Circuit uses a "but for" test to determine whether the claim arises out of forum-related activities. *See, e.g., Ballard*, 65 F.3d at 1500. In this case, in the absence of each of the Defendants' contacts with Washington, including the use of Qwest's local exchange facilities to complete millions of minutes of ordinary long-distance telephone calls, Qwest would have recovered substantial terminating access charges, and Qwest's alleged injuries within the state would not have occurred.

Under the third prong of the Ninth Circuit's test, the burden shifts to the Defendants to present a "compelling case" that the exercise of jurisdiction is unreasonable. *See, e.g., Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2002). Courts typically

[11] Broadvox, Network Overview, http://www.broadvox.com/Security.aspx (last visited Apr. 12, 2009) (attached as Exhibit F).
[12] Broadvox, Available Rate Centers – Washington, http://www.broadvox.com/mapstate.aspx?State=WA (last visited Apr. 12, 2009) (attached as Exhibit G).

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consider seven factors when determining whether the exercise of jurisdiction comports with traditional notions of fair play and substantial justice:

(1) the extent of a defendant's purposeful interjection;

(2) the burden on the defendant in defending in the forum;

(3) the extent of conflict with the sovereignty of the defendant's state;

(4) the forum state's interest in adjudicating the dispute;

(5) the most efficient judicial resolution of the controversy;

(6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and

(7) the existence of an alternative forum.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985). The Defendants have not met their burden with respect to any of these factors. For instance, Broadvox asserts that "all purchases and sales made by Broadvox to and from Washington are made by telephone with follow-up by email or facsimile, if necessary." Affidavit of Eugene Blumin, Dkt. No. 49, ¶ 13 (filed Feb. 6, 2009) [hereinafter *Blumin Aff.*]. This is a "physical presence" argument that has no relevance to this case, where the Defendants' telephone and email contacts act to facilitate their extensive transmission and termination of long-distance calls within the state of Washington. *Ballard*, 65 F.3d at 1498. As the attached Ferguson affidavit shows, each of the Defendants has contracted with entities inside Washington, to purchase physical facilities within Washington, in order to terminate long-distance traffic in Washington. The Defendants have presented carefully parsed claims in an attempt to deflect attention away from these facts, but that effort fails.

As a case in point, Broadvox also argues, *inter alia*, that it has never had any employees or offices in Washington, and that it has never bought nor sold "significant" communications traffic in Washington. *See Blumin Aff.* ¶¶ 7, 8 & 21. In the same breath, however, Broadvox

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acknowledges that it has generated revenue from the business activities it conducts in Washington. For instance, Broadvox states that in 2008, 0.1051% of all of Broadvox's purchasing was from Washington businesses and 0.4189% of all of Broadvox's sales were made to Washington. *Id.* ¶¶ 9-10. Such revenue generation from Washington does not defeat a finding of personal jurisdiction, but rather supports the conclusion that Broadvox is "purposefully deriving benefit" from its activities within the state of Washington. *See Burger King*, 471 U.S. at 473-74 (1985) (quoting *Kulko v. California Superior Court*, 436 U.S. 84, 96 (1978)); *see also Easter v. Am. W. Fin.*, 381 F.3d 948, 961 n.7 (9th Cir. 2004) (noting the significance of deriving income from the forum state in the purposeful availment analysis); *Gordon v. Virtumundo*, No. CV06-0204JCC, 2006 WL 1495770, at *4 n.7 (W.D. Wash. 2006) (Where one Defendant admitted that it had generated 0.04% of its revenue in Washington in 2004 and another Defendant argued that it did not derive "significant" revenue in Washington, these acknowledgements support the conclusion that the Defendants are purposefully deriving benefits from their interstate activities.).

Furthermore, just because Broadvox might provide a greater volume of service to customers in other states does *not* mean that its business activities fail to satisfy the minimum contacts analysis in Washington. *See Korzyk v. Swank Enterprises, Inc.*, No. CV-04-343-AAM, 2005 WL 1378758, at *11 (E.D. Wash. 2005) ("No Washington case . . . has specifically held that determination of whether a corporation's business is 'substantial' in Washington depends on ascertaining the precise percentage of that business compared to business in other states and whether that percentage exceeds some particular threshold."). A company that does business in all 50 states does not lack minimum contacts with Washington simply because the vast volume of its business might occur in other states. Indeed, under such a test, a national company doing

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business in all 50 states could likely never be subjected to jurisdiction in smaller or less populous states like Montana or Rhode Island, as the company's revenues from larger states such as New York, California and Texas would swamp its revenues from smaller states. The question is not whether the Defendants have more or better contacts with Washington, but rather, whether they have sufficient contacts with Washington. Finally, even if the Defendants have "greater" contacts with states such as Texas, in terms of volume of service or revenue, that argument further misses the mark as none of the traffic at issue in this lawsuit was terminated in Texas. Relying on traffic that is *no* part of Qwest's claims to attempt to diminish, by comparison, the extent and sufficiency of the Defendants' direct contacts with Washington, and which contacts relate to the very traffic that is part of Qwest's claims, should be transparently ineffective.

For its part, Transcom similarly claims that it has no offices, employees, or equipment in Washington; that it is not registered to do business in Washington; and that, *as of the date of Qwest's complaint*, it has no contractual relationships with any business or entity located in Washington. Affidavit of Scott Birdwell, Dkt. No. 50, ¶ 8 (filed Feb. 6, 2009) [hereinafter *Birdwell Aff.*]. Transcom's attempt to evade a finding of personal jurisdiction based on its activities on the date of Qwest's Complaint is not relevant, since this assertion obviously says nothing about Transcom's past conduct. For purposes of establishing personal jurisdiction in the Ninth Circuit, the determinative moment is when the claim arose, not when the suit was filed. *See Cooper Carry, Inc. v. Outside the Big Box LLC*, No. C08-5630RBL, 2009 WL 112917, at *3 (W.D. Wash. 2009). Even if the Transcom Defendants did not have a presence in Washington when this action was commenced, they were still subject to personal jurisdiction at that time based on their past conduct, which is part of what is at issue in this lawsuit. Qwest has pled, and now supported with affidavit evidence, that Transcom routed long-distance traffic to Qwest in

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Washington. Whether Transcom does so now is irrelevant for determining whether this Court can exercise personal jurisdiction over Transcom with regard to that past conduct.

The Defendants do not carry their burden with respect to any of the other factors. The Defendants have not alleged that there is any conflict with the sovereignty of their home state. Given the realities of modern communication networks and travel, the burden of defending in this forum is not great. Finally, Washington has a "manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King Corp.*, 471 U.S. at 473 (citation and quotation omitted).

Despite their sweeping assertions to the contrary, Defendants purposefully directed their activities toward Washington, conducted business with ELI, a Washington resident, ordered from ELI circuits within Washington, and caused long-distance traffic to be routed to, and terminated, within Washington. As Qwest has also pled, Defendants have engaged in a fraudulent scheme to disguise this long-distance traffic as local traffic. Defendants have therefore consented to jurisdiction by transacting business within Washington, contracting within Washington, and by committing tortious acts within the state. This Court's exercise of specific jurisdiction would not be unreasonable or inappropriate.

B. In the Alternative, the Court Should Defer Ruling on this Issue or Permit Limited Discovery on Personal Jurisdiction Now

The well-pled facts of Qwest's complaint and the supplemental facts provided in the Ferguson affidavit satisfy Qwest's burden to present a *prima facie* showing of personal jurisdiction over each of the Defendants at this early stage of litigation.

If, however, this Court views the plaintiff's factual support as insufficient, it should either defer ruling on this issue or, in the alternative, permit Qwest to conduct appropriate jurisdictional

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discovery to determine the full nature of the Defendants' Washington contacts. *See, e.g., Harris Rutsky & Co. Ins. Servcs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003); *Mifsud v. Tyco Valves and Controls, L.P.*, No. C06-585JLR, 2006 WL 3692657, at *1 (W.D. Wash. 2006). Here, jurisdictional discovery is particularly appropriate, given the Defendants' attempt to conceal their activity, in order to determine, at a minimum, (1) the contracts that the Defendants have entered into in Washington, (2) the charges assessed by the Defendants to third-party carriers for the termination of calls in Washington, (3) the method by which the Defendants terminated calls in Washington, and (4) the amount of misrouted traffic terminated by the Defendants in Washington.

C. If the Court Grants Defendants' Motions to Dismiss, an Award of Attorneys' Fees Would be Inappropriate

The Defendants challenging personal jurisdiction also seek an award of attorney's fees against Qwest pursuant to WASH. REV. CODE § 4.28.185(5). *See, e.g., Broadvox Mot.* at 7, lines 13 -25; *Transcom Mot.* at 11, line 16 - 12, line 16. To the extent that this Court grants the Defendants' motion to dismiss on the grounds of personal jurisdiction, Qwest respectfully submits that this Court can and should deny Defendants any reimbursement of their attorneys' fees. In the alternative, this Court should, at a minimum, permit Qwest to file a brief at a later time to more fully respond to the Defendants' claims given the page constraints and large number of issues addressed in this brief.

Attorneys' fees are not ordinarily recoverable under federal law in connection with a motion to dismiss for lack of personal jurisdiction. However, the Defendants seek recovery of attorneys' fees under a Washington statute, § 4.28.185(5), which states that when an out-of-state defendant prevails on an action, "there *may* be taxed and allowed to the defendant as part of the

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costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees." (emphasis added). A prevailing defendant is not, however, automatically entitled to an award of attorneys' fees under this section, as the language of the statutory provision itself demonstrates. *See, e.g., Silvaris Corp. v. Brissa Lumber Corp.*, No. C07-0196MJP, 2008 WL 2697186, *2 (W.D. Wash. 2008). Accordingly, this Court has broad discretion to deny an award of attorneys' fees.

The Washington Supreme Court has recognized that one of the significant policies served by § 4.28.185(5) is to deter plaintiffs from invoking long-arm jurisdiction to harass out-of-state defendants. *See Fetzer v. Weeks*, 786 P.2d 265, 272 n.6 (Wash. 1990). Here, an award of attorneys' fees would serve no such purpose, as there has been no such harassment. The record demonstrates that Qwest has brought its claims against the Defendants in this forum in a good faith attempt to protect its property rights. The suit was brought in a forum where Qwest conducts a significant amount of business and where a substantial amount of Defendants' fraudulent conduct occurred. Qwest has presented evidence of a number of contacts between each of the Defendants and this forum, including the Defendants' ordering and use of local circuits within the state of Washington to route long-distance traffic to Qwest for termination within the state of Washington. Because Qwest has not invoked Washington's long-arm statute for any improper purpose, the primary policy of § 4.28.185(5) would not be served by an award of attorneys' fees.

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V. RESPONSE TO MOTIONS TO DISMISS FOR IMPROPER VENUE AND/OR TO TRANSFER VENUE

A. The Defendants have Failed to Demonstrate that a Transfer of Venue is Warranted

The Defendants move to dismiss for improper venue, or, in the alternative, seek a transfer of venue to the United States District Court for the Northern District of Texas. The motion to dismiss for improper venue should be denied, as venue is clearly proper as alleged in the Complaint, based on the fact that each Defendant is subject to personal jurisdiction in Washington, as explained in the preceding section of Qwest's brief. For the purposes of 28 U.S.C. § 1391(c), a defendant corporation is "deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." Because each of the Defendants are subject to personal jurisdiction in Washington, venue is proper under 28 U.S.C. § 1391(c).

With regard to the Defendants' request to transfer venue pursuant to 28 U.S.C. § 1404, the burden is on Defendants to demonstrate that a transfer of venue is warranted. *See Saleh v. Titan Corp.*, 361 F.Supp.2d 1152, 1155 (C.D. Cal. 2005). Transfer should not be effectuated if it "would serve to merely shift rather than eliminate the inconvenience" of the parties. *Wilton v. Hallco Industries, Inc.*, No. C08-1470RSM, 2009 WL 113735, at *4 (W.D. Wash. 2009) (citing *DIRECTV, Inc. v. EQ Stuff, Inc.*, 207 F.Supp.2d 1077, 1083 (C.D. Cal. 2002)).

B. The Convenience of the Parties, the Convenience of the Witnesses, and the Interests of Justice Warrant Venue in this District

Under 28 U.S.C. § 1404(a), "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The statute has two requirements on its face. First, the

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district to which Defendants seek to have the action transferred must be one in which the action "might have been brought." 28 U.S.C. § 1404(a). Second, the transfer must be for the "convenience of the parties and witnesses," and "in the interest of justice." *Id.* In determining whether a transfer is appropriate under the second set of requirements, the Court weighs a number of factors, including:

(1) the location where the relevant agreements or alleged events in the lawsuit took place;

(2) the state that is most familiar with the governing law;

(3) the plaintiff's choice of forum;

(4) the respective parties' contacts with the forum, and the relation of those contacts with the plaintiff's cause of action;

(5) the difference of the cost of litigation in the two forums;

(6) the availability of the compulsory process to compel attendance of non-party witnesses; and

(7) the ease of access to sources of proof.

See Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000). Other relevant considerations, drawn from the traditional *forum non conveniens* analysis, include the pendency of related litigation in the transferee forum, the relative congestion of the two courts, and the public interest in the local adjudication of local controversies. *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

With respect to the convenience of the parties, there is a strong presumption in favor of the plaintiff's choice of forum. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Situations where that presumption has not been given deference generally deal with plaintiffs who do not reside in the forum where the litigation was originally brought. *See Wilton*, 2009 WL 113735, at *2 (citing *Saleh*, 361 F.Supp.2d at 1157-58 (collecting cases)). Such is not the

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case here. Nevertheless, Broadvox seeks to mitigate the importance of this factor by claiming that "all of the parties" have a "substantial presence" in Texas. Broadvox Mot. at 9, line 22. That is untrue. Qwest has effectively no presence in Texas. Qwest is not duly registered or certified as a telecommunications carrier with the Public Utility Commission of Texas. Qwest does not serve any access lines in the state of Texas, nor does QC receive any customer service-generated revenue in the state of Texas. Affidavit of Kevin MacWilliams at 3, lines 20-23 (attached as Exhibit H) [hereinafter *MacWilliams Aff.*]. By contrast, Qwest conducts a significant amount of business in Washington, as the MacWilliams' affidavit shows. Qwest is an incumbent local exchange carrier in Washington. *MacWilliams Aff.* at 2, lines 20-32. It has numerous central offices and network connections around the state, maintains nearly 1.7 million access lines (*i.e.*, lines to customer locations), and earns close to $1.3 billion in revenues in Washington. *MacWilliams Aff.* at 3, lines 1-3 and lines 12-15. Thus, while Qwest would certainly be considered a resident of Washington for venue purposes under 28 U.S.C. § 1391(c), the same is not true for Texas. In addition, it can hardly be said that Qwest's presence in Texas is "substantial."

Defendants also ignore that the alleged events that gave rise to the instant lawsuit occurred in Washington (and other states where Qwest provides local service), and not in Texas. Qwest's lawsuit pertains to charges for the termination of long-distance phone calls. None of the calls at issue for which Qwest seeks payment were terminated in Texas (nor could they have been, as Qwest does not have authority to operate as a local exchange carrier in Texas). Further, Washington law, at least in part, will apply to Qwest's claims, while Texas law will not. This Court is certainly more familiar with Washington law than would be the Court for the Northern District of Texas. *Jones*, 211 F.3d at 498.

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Nonetheless, Broadvox asserts that "there are minimal, if any, operative facts connecting Broadvox to Washington," and therefore no weight should be given to Qwest's choice of venue. *Broadvox Mot.* at 9, lines 4-5. To the contrary, Qwest has chosen a forum where it does a significant amount of business and where a substantial amount of Defendants' fraudulent conduct occurred. By contrast, none of the long-distance traffic for which Qwest seeks compensation in this lawsuit was terminated in Texas. Broadvox also alleges, without further explanation, that Qwest has elected to file suit in this Court because it is clearly engaging in "forum shopping." *Broadvox Mot.* at 10, lines 3-5. This baseless accusation hardly satisfies the Defendants' burden to demonstrate that a transfer of venue is warranted, particularly given that Qwest demonstrated that a substantial portion of the conduct at issue occurred in Washington.

Finally, UniPoint seeks to justify transfer by claiming that traffic terminating to numbers assigned to Washington amounted to 0.77% of UniPoint's overall business in 2008. Affidavit of J. Michael Holloway, Dkt. No. 44, Attach. 1, ¶ 3 (filed Feb. 6, 2009) [hereinafter *Holloway Aff.*]. As previously discussed, such revenue generation from Washington does not support a finding of transfer, but rather supports the conclusion that UniPoint (like Broadvox, which asserted the same argument as to personal jurisdiction) is "purposefully deriving benefit" from its interstate activities and is subject to the personal jurisdiction of this Court. *Burger King*, 471 U.S. at 473 (quoting *Kulko*, 436 U.S. at 96); *see also Easter*, 381 F.3d at 961 n.7 (noting the significance of deriving income from the forum state in the purposeful availment analysis); *Gordon*, 2006 WL 1495770, at *4 n.7 (Where one Defendant admitted that it had generated 0.04% of its revenue in Washington in 2004 and another Defendant argued that it did not derive "significant" revenue in Washington, these acknowledgements support the conclusion that the Defendants are purposefully deriving benefits from their interstate activities.).

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Like Broadvox, UniPoint has not explained why the proportion of its termination of calls in Washington, as measured against all calls that it terminates throughout the country, should have *any* countervailing evidentiary significance whatsoever, particularly since, by definition, any traffic terminated by UniPoint in non-Qwest states can be no part of Qwest's claims. It may well be that UniPoint terminates a much larger volume of traffic in Texas, or New York, or California, as compared to Washington or any of the 14 Qwest states, for that matter. In fact, that is entirely likely – but it is also entirely irrelevant. With regard to the 4th factor noted by the *Jones* court (the relation of the parties' contacts with the forum and the relation of those contacts to the Plaintiff's cause of action), there are simply no Texas contacts whatsoever that relate to the conduct addressed by Qwest's cause of action. In similar fashion, with regard to the 2nd factor noted by the *Jones* court, there is no Texas law to be applied here.

The Defendants have also failed to meet their burden of demonstrating inconvenience to witnesses. In particular, the party seeking to transfer venue bears the burden of explaining why key non-party witnesses will be unwilling or unable to travel to the forum; why the forum will not be able to compel their appearance; and why their testimony could not be adequately presented by deposition. The Defendants have failed to identify a single non-party witness whose testimony is material to this case and who will be unable and unwilling to attend trial in Washington. There is no key piece of evidence or a series of documents that are material to the instant case that make Texas more convenient to the parties than Washington. Even assuming that there were, there is little doubt that the Defendants can easily transmit such information through email if the information is stored electronically.

In a similar vein, it is worth noting that UniPoint's principal place of business is located in Austin, Texas. *Holloway Aff.* ¶ 1. But UniPoint, by joining in the Broadvox Defendants'

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motion to transfer, is not even seeking a transfer to its home district. UniPoint is headquartered in the Western District of Texas, approximately 200 miles from Dallas. UniPoint claims that it "will incur substantial costs and loss of employee time" if it must litigate this case in Washington; and "if any UniPoint employee or executive witness is required to travel to Washington, his or her ability to work and run UniPoint's business will be significantly impaired." *Id.* ¶ 5. UniPoint does not explain why, especially in the digital age, transmitting records from Austin to Washington is more onerous than transmitting them from Austin to Dallas. Nor does the affidavit deny that UniPoint would also incur substantial costs in terms of lost employee time if its employees had to drive 200 miles from Austin to attend a trial in the Northern District of Texas.

With respect to the interest of justice, Defendants make no claim that there is related litigation currently taking place in the Northern District of Texas. Defendants also make no showing that the Northern District of Texas can litigate this claim any faster than this Court. In point of fact, this factor is neutral. According to the Federal Court Management Statistics for 2008, which are available at www.uscourts.gov, the median time for a civil action from filing to disposition in the Northern District of Texas was 7.4 months. In the Western District of Washington, the median time for filing to disposition was 7.1 months during this same time period.

In sum, this Court should not grant a change of venue motion merely to shift the burden of inconvenience from one party to another – particularly where a large portion of the Plaintiff's claims are based on specific conduct (the termination of traffic) within the state of Washington, and no portion of those claims are related to Texas. Qwest's selection of Washington as a forum

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is entitled to great weight and may be disturbed only in the rare instance where convenience and the interests of justice strongly favor a transfer. This is not one of those instances.

VI. RESPONSE TO MOTIONS TO DISMISS (OR STAY) THE CASE IN DEFERENCE TO THE PRIMARY JURISDICTION OF THE FCC

The Court should allow this case to proceed, denying Defendants' appeal to the primary jurisdiction of the FCC. This Court need not await guidance from the FCC to resolve the fundamental issue presented by Qwest's Complaint, because, as Defendants know all too well, that issue has already been resolved by the FCC, in the "IP-in-the-Middle" proceeding in which at least two Defendants participated.[13] UniPoint and Transcom there made exactly the same arguments that they now make in this proceeding as to why IP-in-the-Middle long-distance phone calls should not be subjected to terminating access charges. The FCC flatly rejected those arguments; nonetheless, these Defendants have chosen to simply ignore the FCC's determination, and continue their fraudulent scheme to avoid paying access charges.

As a fallback, presumably understanding the futility of their argument that access charges are not owed on IP-in-the-Middle long-distance calls, Defendants seek to pass the buck, arguing that, whoever is liable, it is not them. Defendants argue this is so because they "are not" IXCs, nor has Qwest sufficiently pled that they are IXCs. Neither is true. Qwest pled that, with regard to the long-distance calls at issue in this lawsuit, and with regard to each Defendant's handling of those calls, each of the Defendants "act as an interexchange carrier." *Complaint* at 8, lines 1-3. Contrary to the Defendants' suggestion, it does not matter, nor is Qwest required to plead and prove, whether the Defendants "are" IXCs at all times and for all purposes. What matters, as FCC precedent makes clear, is whether the Defendants acted as IXCs for the purpose of the

[13] UniPoint and Transcom made extensive filings in that docket, as explained in more detail herein.

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conduct at issue in this lawsuit. Qwest has adequately pled that, including factual allegations to support such a finding, and is entitled to adduce facts in discovery bearing on this factual determination.

Defendants' motion in this regard is by parts a motion to dismiss based on what they claim is a deficient pleading, by parts a motion to dismiss because they argue they are not IXCs, and by parts a motion to defer to the FCC's primary jurisdiction because, Defendants maintain, determining whether they are IXCs is an issue that requires guidance from the FCC. The Court should deny all three aspects of this motion. Qwest has adequately pled that Defendants act as IXCs, and that pleading is sufficient to state a claim. Further, the Court should not make the factual determination now, within the context of a motion to dismiss and prior to any discovery, as to whether Defendants have in fact acted as IXCs with regard to the long-distance calls at issue in this lawsuit. Finally, once the time comes to make that determination, whether on motions for summary judgment or at trial, this Court is competent to apply existing law to the facts, as they are developed, and determine whether the Defendants act as IXCs with regard to their handling of the calls at issue.

A. Background on the Doctrine of Primary Jurisdiction

The doctrine of primary jurisdiction "is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision making responsibility should be performed by the relevant agency rather than the courts." *County of Santa Clara v. Astra USA, Inc.*, 540 F.3d 1094, 1108 (9th Cir. 2008) (quotations omitted). The Court of Appeals for the Ninth Circuit has emphasized that "[t]he doctrine does not require that all claims touching on an agency's expertise first be decided by the agency. . . ." *Id.*; *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086 (9th Cir. 2006) ("The doctrine does not, however, require that all

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claims within an agency's purview be decided by the agency." (quotations omitted)); *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) ("[T]he doctrine is not designed to 'secure expert advice' from agencies every time a court is presented with an issue conceivably within the agency's ambit." (quotations omitted)). This, of course, is all the more true where, as here, the agency has already provided its "expert advice."

The two underlying purposes for the doctrine of primary jurisdiction are: 1) to promote uniformity when a specialized agency first passes on certain types of administrative questions, and 2) to allow a court to defer judgment on a technical issue to the agency with expert and specialized knowledge. *U.S. v. W. Pac. R. Co.*, 352 U.S. 59, 64 (1956). In other words, "[p]rimary jurisdiction is a concept that expresses both initial deference to the administrative agency and the concern for conservation of judicial resources. Neither purpose is served by using the doctrine when the agency has already said what it thinks . . . ." *Klicker v. Nw. Airlines, Inc.*, 563 F.2d 1310, 1313 (9th Cir. 1977).

The Court of Appeals for the Ninth Circuit has no fixed formula for applying the primary jurisdiction doctrine, but has "traditionally examined the factors set forth in *General Dynamics*." *Clark*, 523 F.3d at 1115; *Greene v. T-Mobile USA, Inc.*, No. C07-1563RSM, 2008 WL 351017, at *2 (W.D. Wash. 2008). Under this approach, the primary jurisdiction doctrine applies only where there is "(1)[a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Clark*, 523 F.3d at 1115; *Davel Commc'ns, Inc.*, 460 F.3d at 1086-87 (citing *U.S. v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987)); *County of Santa Clara*, 540 F.3d at 1108.

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This Court, in the *Greene* case cited above, has had occasion to consider and apply the doctrine of primary jurisdiction in the context of early termination fees ("ETF") for wireless contracts. *Greene*, 2008 WL 351017, at *1. In *Greene*, this Court determined that the doctrine of primary jurisdiction weighed in favor of referring the matter to the FCC. *Id.* at *4. A principal factor in that decision was the fact that the FCC was engaged in proceedings to determine the ETF issue in the wireless context. *Id.*

Here, by contrast, the FCC has *already* decided the IP-in-the-Middle issue, and determined that access charges apply to such long-distance calls. The *Klicker* case is particularly instructive on this point. Plaintiff there sued Northwest Airlines for the negligent death of her champion golden retriever. Northwest attempted to limit its liability based on an exculpatory provision in its tariff, arguing that the Civil Aeronautics Board ("CAB") had the exclusive jurisdiction and agency expertise to decide whether the tariff applied. The CAB, however, had already considered and invalidated the exculpatory provision. The Ninth Circuit rejected Northwest's primary jurisdiction argument, stating that "it has no application where, as here, the CAB has heretofore decided that the exculpatory tariff rule is 'unlawful' and ordered its cancellation." *Klicker*, 563 F.2d at 1312. Such is the case here. The FCC has already determined, and reaffirmed numerous times, that access charges apply to IP-in-the-Middle long-distance calls.

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B. Application of Access Charges to IP-in-the-Middle Long-Distance Calls is Settled Law

Over the past ten years, the FCC has provided clear and consistent guidance that access charges are applicable to IP-in-the-Middle long-distance calls.[14] The applicability of access charges to IP-in-the-Middle calls in the same manner as traditional circuit-switched PSTN-to-PSTN long-distance calls is only logical. The burden on the local exchange networks to originate and terminate long-distance calls is identical, irrespective of the underlying transport technology utilized to transmit the call between local exchanges. Under longstanding FCC precedent, the choice of transport technology makes no difference to the applicability of access charges, so long as the long-distance call originates and terminates on the PSTN.[15]

As early as 1998, the FCC began addressing and formalizing the regulatory classification and treatment of IP-in-the-Middle service.[16] The FCC outlined the essential characteristics of IP-in-the-Middle service (which at that time was known as "Phone-to-Phone IP telephony") and even at this early stage concluded that IP-in-the-Middle was likely a "telecommunications service."[17] Furthermore, as a telecommunications service, the FCC went on to explain that IP-in-the-Middle service providers "obtain the same circuit-switched access as obtained by other

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[14] *E.g.*, Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, ¶¶ 88-89 & 91 (1998) [hereinafter *1998 Report to Congress*]; *IP-in-the-Middle Order*, *supra* note 2, ¶¶ 1 & 14-20; *Calling Card Order*, *supra* note 5, ¶¶ 18-20, 27, & 43.

[15] *See, e.g.*, *IP-in-the-Middle Order*, *supra* note 2, ¶ 17; *1998 Report to Congress*, *supra* note 14, ¶ 59 ("A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends rather on the nature of the service being offered to customers."); *see also* Notice of Apparent Liability for Forfeiture, *Compass Global, Inc. Apparent Liability for Forfeiture*, 23 FCC Rcd. 6125, ¶ 18 (2008) ("The Commission has said that the definitions of 'telecommunications service' and 'information service' do not hinge on the particular type of facilities used, but on the functions available").

[16] *1998 Report to Congress*, *supra* note 14, ¶¶ 83-93.

[17] *Id.* ¶¶ 88-89.

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interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers," making "it reasonable that they pay similar access charges."[18]

In 2004, the FCC built on the *1998 Report to Congress* and removed any doubt as to the regulatory classification and treatment of IP-in-the-Middle service as a telecommunications service.[19] In its *IP-in-the-Middle Order* discussed in the *Complaint* at 16, line 9 – 17, line 18 and throughout this brief, the FCC considered a petition filed by AT&T, seeking a "declaratory ruling that its 'phone-to-phone' Internet Protocol (IP) telephony services [were] exempt from the access charges applicable to circuit-switched interexchange calls."[20] The FCC identified IP-in-the-Middle service based on three essential characteristics. According to the FCC, IP-in-the-Middle is an interexchange service that:

> (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.[21]

AT&T argued that its IP-in-the-Middle long-distance service was not subject to access charges, because, by virtue of this IP-in-the-Middle transport component, it was providing an information service, not a telecommunications service. That is the same argument Defendants advance here. The FCC rejected this argument, and held that AT&T's service was a telecommunications service subject to access charges. The FCC further emphasized that the "analysis in this order applies to services that meet these three criteria regardless of whether only

[18] *Id.* ¶ 91.
[19] *IP-in-the-Middle Order*, *supra* note 2, ¶ 12.
[20] *Id.* ¶ 1.
[21] *Id.*

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one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport."[22]

In particular, the FCC determined that by routing long-distance calls through a CLEC to the ILEC for termination to the called party, IP-in-the-Middle services "use local exchange switching facilities for the provision of interstate or foreign telecommunications."[23] The FCC noted that, in many cases where the called party was served by an ILEC (such as Qwest), AT&T "purchases PRIs [primary rate interfaces] from a competitive LEC," which in turn "terminates the call over reciprocal compensation trunks."[24]

That is precisely the same conduct and call flow as Qwest has pled in its Complaint. The Local Interconnection Service ("LIS") trunks over which Qwest is receiving this traffic, as alleged in its Complaint, are the very "reciprocal compensation trunks" noted by the FCC in the *IP-in-the-Middle Order.* Qwest has also specifically alleged that, "rather than delivering these calls directly to Qwest as long-distance calls, Defendants deliver them instead to an intermediate CLEC by way of a local service designed for exchange of local traffic, typically a primary rate interface ("PRI") service. Defendants purchase this PRI service from a CLEC, pursuant to the CLEC's tariff or a specific contract with the CLEC." *Complaint* at 9, lines 16-20. In the *IP-in-the-Middle Order*, The FCC held that AT&T was liable for access charges when engaged in routing ordinary long-distance calls to CLEC over PRI services, for transmission to the ILEC over LIS trunks and ultimate termination to the end user. It must be equally true that Defendants here, who are engaging in precisely this same conduct, are liable as well.

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[22] *Id.*
[23] *IP-in-the-Middle Order, supra* note 2, ¶ 11 n.49.
[24] *Id.*

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As per FCC practice, the IP-in-the-Middle docket allowed for comment by interested parties. UniPoint and Transcom each submitted numerous and voluminous filings in that docket, and met with FCC staff to advocate their positions, making the very same arguments that they now make to this Court regarding the nature of IP-in-the-Middle long distance services and the applicability of access charges to such services. Exhibits I and J, catalog the filings made by UniPoint and Transcom, respectively, in the IP-in-the-Middle docket. The FCC rejected their arguments. For instance, UniPoint argued that: "[t]he sole relevant inquiry into whether a service involving VoIP is a regulated common carrier service is whether it is an *information* service or a *telecommunications* service."[25] Transcom argued that: "[a]s with all of IP, packetization and adding of protocols makes VoIP an enhanced service."[26] The FCC determined that IP-in-the-Middle long-distance, however, is a telecommunications service, not an information service or enhanced service. This Court should not indulge UniPoint's and Transcom's request to now refer these same issues to the FCC for consideration, particularly given that the FCC has already rejected the very arguments UniPoint and Transcom now resuscitate in this lawsuit.

In the end, Defendants cannot credibly argue that the call flow relating to the long-distance calls at issue here is any different than that considered by the FCC in the IP-in-the-Middle docket. To reiterate, access charges are owed on such calls, irrespective of whether the call architecture involves a single integrated provider like AT&T, or multiple service providers.[27]

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[25] Letter from Kemal Hawa, counsel for UniPoint, to Marlene H. Dortch, FCC, WC Docket No. 02-361, *et al,* Attach, at 3 (FCC filed April 14, 2004) (emphasis in original).

[26] Letter from W. Scott McCullough, counsel for Transcom, to Marlene H. Dortch, FCC, WC Docket No. 02-361, *et al,* Attach. Declaration of Chad Frazier, ¶ 10 (FCC filed Sept. 23, 2003).

[27] *IP-in-the-Middle Order*, *supra* note 2, ¶ 1 ("Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or multiple service providers are involved in providing IP transport.").

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UniPoint recognizes and acknowledges this same irrefutable fact in its motion to dismiss: "Qwest (like other ILECS) receives 'access charge' payments under federal law when it originates or terminates PSTN long-distance calls carried by IXCs . . . ." *UniPoint Mot.* at 5, lines 7-9. Defendants will no doubt contend that the distinguishing fact with regard to their conduct is that, unlike AT&T, they are not "interexchange carriers," and therefore, while access charges may apply, *they* cannot be the parties responsible to pay those access charges on these long-distance calls.

That is nothing but a shell game, however, as Qwest explains later, and indulging such semantic sleight of hand would unquestionably lead to discriminatory practices with regard to assessment of access charges on similarly situated providers. Indeed, avoiding such discrimination was a primary rationale underpinning the FCC's decision in the *IP-in-the-Middle Order,* where the FCC made quite clear its concern regarding the potential disparate treatment of identical services. The FCC expressly noted that it was necessary to ensure that no carrier was placed at a "competitive disadvantage," and that its order sought "to remedy the current situation in which some carriers may be paying access charges for these services while others are not."[28] The FCC also observed that: "IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid paying access charges."[29] To put a finer point on the issue, the FCC stated that: "we see no benefit in promoting one party's use of a specific technology to engage in arbitrage at the cost of what other parties are entitled to under the statute and our rules."[30]

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[28] *IP-in-the-Middle Order, supra* note 2, ¶ 19.
[29] *Id.* ¶ 18.
[30] *Id.* ¶ 17.

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AT&T was responsible for access charges, notwithstanding its use of IP-in-the-Middle transport, because it utilized the local exchange carrier's facilities to terminate its long-distance traffic in the same fashion, and to the same degree, as interexchange carriers not using IP-in-the-Middle transport. It must follow that the Defendants here are responsible for access charges, as they utilize the local exchange carrier's (Qwest's) facilities *precisely* as did AT&T's service under consideration in the FCC's *IP-in-the-Middle Order.* Any other result would be discriminatory, as explained in more detail herein.

That the *IP-in-the-Middle Order* must apply to similarly situated providers was transparent from the FCC's reasoning in that docket. While the FCC limited the specific application of its decision in the *IP-in-the-Middle Order* to just the AT&T service that was under consideration in that docket, it also made quite clear that the analysis would be applied on a going forward basis to all such services that satisfied the three-part test set forth in that Order.[31] In fact, the FCC has treated the *IP-in-the-Middle Order* as a generalized rule of law in subsequent decisions.[32] For instance, in the *Calling Card Order*, the FCC relied on the *IP-in-the-Middle Order* to underpin its conclusion that "providers of prepaid calling cards that . . . use IP transport to offer telecommunications services are obligated to pay interstate or intrastate access charges based on the location of the called and calling parties."[33] The FCC went on to state that:

> [T]he Commission previously found, in the [*IP-in-the-Middle Order*], that the use of IP transport, without more, did not change the regulatory classification of the service at issue. That decision provided ample notice that merely converting a calling card call to IP format and back does not transform the service from a telecommunications service to an information service, and, consequently, it

[31] *IP-in-the-Middle Order, supra* note 2, ¶ 1.
[32] *E.g., Calling Card Order, supra* note 5, ¶¶ 3 & 20; Notice of Apparent Liability for Forfeiture, *Compass Global, Inc. Apparent Liability for Forfeiture*, 23 FCC Rcd. 6125, ¶¶ 19-20 (2008)
[33] *Calling Card Order, supra* note 5, ¶ 27.

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> undermines any alleged reliance by prepaid card providers on any contrary interpretation of our rules.[34]

So, here, merely converting a long-distance call to IP format and back does not transform the service from a telecommunications service to an information service.[35] As recently as November 2008 the FCC again reaffirmed the generalized rule that it established in the *IP-in-the-Middle Order*.[36]

The Defendants attempt to misdirect on this point by conflating the open question of the regulatory treatment of Interconnected VoIP and other IP-enabled services, and open FCC dockets relating to those issues, with the settled law regarding IP-in-the-Middle long-distance service.[37] For instance, UniPoint implies that the *Petition of the Embarq Local Operating Companies for Limited Forbearance* (the "*Embarq Petition*") pending before the FCC when UniPoint filed its motion has relevance to this case. *UniPoint Mot.* at 22 lines 16-21. Contrary to UniPoint's assertion, the *Embarq Petition* – which has now been withdrawn in any event[38] –

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[34] *Id.* ¶ 43 (citing the *IP-in-the-Middle Order*, *supra* note 2, ¶ 1).

[35] Transcom suggests that, alternatively, its service is an information service because it "adds, deletes, or changes some of the original subscriber-generated content." *Transcom Mot.* at 6, lines 7-8. Transcom, however, provides no specific details to support this conclusory allegation. Qwest pled in its Complaint that, while Defendants may make such a claim, in point of fact they add no such functionality, customers request no such additional functionality, and indeed, would not even be aware of such added functionality, if in fact it is provided. *Complaint* at 15, line 19 – 16, line 2. Accordingly, at a minimum this is legal determination based on disputed facts that cannot be resolved against Qwest in a motion to dismiss posture.

[36] *Nov. 5, 2008 FNPRM*, *supra* note 3, Appendix A, ¶ 208 & n.528 (Westlaw n.667) ("With respect to the statutory classification of IP-enabled services, however, the Commission only has addressed two situations." In the second situation, "the Commission found that certain 'IP-in-the-middle' services were 'telecommunications services' where they: (1) use ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originate and terminate on the public switched telephone network (PSTN); and (3) undergo no net protocol conversion and provide no enhanced functionality to end users due to the provider's use of IP technology.") (citing generally *IP-in-the-Middle Order*, *supra* note 2 and *Calling Card Order*, *supra* note 5).

[37] *See, e.g.*, Feature Group IP Petition for Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules, Memorandum Opinion & Order, FCC 09-3, WC Docket No. 07-256, ¶ 4 (Jan. 21, 2009) ("Feature Group IP requests that the Commission 'hold that Voice Embedded Internet-based communications, services and applications that involve or are part of (i) a net change in form; (ii) a change in content; and/or (iii) an offer of non-adjunct to basic enhanced functionality are enhanced services and, therefore, that the so called 'ESP Exemption' from access charges still applies.'");

[38] Letter from Jeffrey S. Lanning, Director-Federal Regulatory Affairs, Embarq, to Marlene H. Dortch, FCC, withdrawing Embarq Petition in WC Docket No. 08-8 (filed Fed. 11, 2009).

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sought only to have the FCC address the open question of the regulatory treatment of Interconnected VoIP services and had nothing to do with IP-in-the-Middle services.[39] UniPoint also cites, to the same effect, the recent FCC order denying the *Feature Group IP Petition for Forbearance* (the "*Feature Group IP Petition*"). *UniPoint Mot.* at 22 n.13. But, again, the *Feature Group IP Petition* was not addressing IP-in-the-Middle calls at issue here. The *Feature Group IP Petition* only sought to address the application of access service charges to "voice-embedded Internet communications," which Feature Group IP defined as:

> a particular subset of [voice over Internet Protocol (VoIP)] communications that do not merely use the Internet Protocol [(IP)] to transmit voice signals undifferentiated from [public switched telephone network (PSTN)] traffic, but actually uses Internet Protocol to provide voice applications as part of a large Internet communications experience.[40]

The PSTN to PSTN long-distance calls at the heart of this dispute, in contrast, are "voice signals undifferentiated from [PSTN] traffic;" they are not "voice-embedded Internet communications" and were not implicated by the *Feature Group IP Petition.* That docket, like the *Embarq* docket, has nothing to do with the long-settled IP-in-the-Middle issue.

UniPoint also implies that a long-standing docket at the FCC dealing with IP-enabled services will consider and resolve the issues raised by Qwest in this lawsuit, noting that the FCC "is also considering the ILECs' efforts to extend the access-charge regime to IP-enabled services and business practices – the precise effort Qwest undertakes in the Complaint at issue here."

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[39] Order Extending Deadline, *Petition of the Embarq Local Operating Companies for Limited Forbearance under 47 U.S.C. §160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. §251(b), and Commission Orders on the ESP Exemption*, FCC Wireline Competition Bureau, DA 09-19, ¶ 2 (Jan. 9, 2009) ("On January 11, 2008, Embarq filed a petition asking the Commission to forbear from any application or enforcement of the ESP exemption to *IP-to-PSTN* voice traffic [(*i.e.*, Interconnected VoIP)]." (emphasis added)).

[40] Memorandum Opinion & Order, *Feature Group IP Petition for Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules*, FCC 09-3, WC Docket No. 07-256, ¶ 4 & n.13 (Jan. 21, 2009).

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UniPoint Mot. at 5 n.5. That is also untrue. The issue in the instant case is the applicability of access charges to IP-in-the-Middle long-distance, and that issue has long been resolved at the FCC.[41] The purpose behind UniPoint's misleading statement should be apparent: UniPoint seeks to muddy the waters by suggesting that if there is *any* open docket at the FCC dealing with IP issues, then it must follow that the issues in this lawsuit are awaiting a definitive pronouncement from the FCC.[42]

Finally, UniPoint offers comments filed by Qwest in an FCC docket opened by SBC relating to IP-in-the-Middle traffic, to suggest, misleadingly, that Qwest has acknowledged that this is not a settled area of law. *UniPoint Mot.* at 19, line 12 – 20, line 15. UniPoint states that "Qwest explained that the Declaratory Ruling Proceeding raised the 'broad[] issue of who is liable in multi-carrier access traffic flows.'" *Id.* at 19, lines 16-17 (quoting Qwest). UniPoint then goes on to state that "Qwest urged the FCC to 'expound upon the broader multi-carrier liability issues implicated' by the primary jurisdiction referral." *Id.* at 19, lines 22-23 (quoting Qwest). Based on these two quotes taken out of context, UniPoint asks the Court to draw the inference that an absence of liability rules exist in this arena involving "complex policy choices," and that therefore deferral to the FCC's primary jurisdiction would be appropriate. *Id.* at 20,

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[41] As noted in a respected treatise on telecommunications policy: "[T]here are, for regulatory purposes, three basic categories of VoIP calls . . . . In "PSTN-to-PSTN" calls, both parties connect to the public (circuit-) switched network using ordinary telephones, but the long-distance provider has routed their signals over an intermediate IP transport network. . . . . The compensation rules for the first two categories [including PSTN-to-PSTN] are settled. . . . . [b]ecause the FCC has equated PSTN-to-PSTN calls with ordinary circuit-switched telephony for access charge purposes (citation omitted), those calls are subject to the same intercarrier compensation rules that would apply if there were no IP transport link in the middle." Jonathan E. Nuechterlein & Philip J. Weiser, DIGITAL CROSSROADS 303 (The MIT Press 2005).

[42] In a similarly misleading vein, UniPoint contends that this lawsuit is really about "convincing the Court to adopt an intercarrier compensation regime more favorable to Qwest's bottom line." *UniPoint Mot.* at 5, line 15. The fact is that the FCC already *has* adopted the intercarrier compensation regime that applies to IP-in-the-Middle long distance, and that regime is access charges, not the "reciprocal compensation" payments that are paid for the termination of local traffic, as UniPoint argues.

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lines 6-8. Contrary to UniPoint's assertion, however, Qwest made clear in its comments that the central aspects of the petitions presented "no new legal issues."[43] Moreover, the quotes taken out of context by UniPoint relate to apportioning liability between multiple carriers handling a given call, and are irrelevant to this case because Qwest has only asserted its claims against a single Defendant for each call at issue. *See UniPoint Mot.* at 19, line 16 – 20, line 15.

Notwithstanding UniPoint's mighty efforts at misdirection, there can be no reasonable debate on this point: It is settled law that access charges apply to IP-in-the-Middle long-distance, and it has been settled by the agency to which Defendants would have this dispute dispatched, for unneeded reaffirmation. The FCC is of course free to amend or completely overhaul the access service charge regime, but if it does so, it may do so only prospectively.

C. Contrary to the Assertions of the Defendants, the FCC has Made Clear Through its Existing Rules and Precedent that the Defendants are Liable for Terminating Access Charges

UniPoint also asserts that they, and the other Defendants, cannot be liable for access charges because they are not IXCs. *E.g.*, *UniPoint Mot.* at 8, lines 10-13. This argument really has three components. First, UniPoint contends that Qwest has not adequately pled a claim to recover access charges from Defendants, because Qwest has pled only that Defendants "act" as IXCs with regard to their conduct, and the long-distance traffic at issue here, rather than pleading

[43] Comments of Qwest Communications International, Inc., *SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, FCC, WC Docket No. 05-276, at 12 (filed Nov. 10, 2005); Reply Comments of Qwest Communications International, Inc., *SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, FCC, WC Docket No. 05-276, at 2-3 & 6-7 (filed Dec. 12, 2005). *See also* Comments of Qwest Communications International, Inc., *Frontier's Petition for Declaratory Ruling Regarding the Application of Access Charges to IP-Trasported Calls*, FCC, WC Docket No. 05-276, at 2 (filed Jan. 9, 2006) ("In [the VoIP-in-the-Middle] decision, the Commission made it unambiguously clear that access charges apply to such traffic and that this is so regardless of whether only one interexchange carrier is involved in transporting the traffic or multiple service providers are involved. There was overwhelming agreement on this issue in the extensive comments filed in connection with the SBC and VarTec Petitions.").

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that Defendants "are" IXCs. *Id.* at 9, lines 5-8. Next, UniPoint argues that Defendants, in any event, are not IXCs. *Id.* at 10, lines 9-10. Those two arguments each present a Rule 12(b)(6) motion to dismiss. Finally, UniPoint asserts that, in any event, this Court cannot determine whether Defendants are IXCs subject to access charges without guidance from the FCC, and therefore maintain that the Court should stay this matter and refer it to the FCC under the doctrine of primary jurisdiction. Because the Rule 12(b)(6) aspects and the primary jurisdiction aspects of these arguments are interrelated, Qwest addresses them collectively here. They all turn on the common question of whether these Defendants can be liable for access charges based on the conduct described in Qwest's Complaint.

1. *Qwest's Complaint alleging that Defendants act as IXCs for purposes of the long-distance traffic at issue here sufficiently pleads a claim for payment of access charges.*

Qwest has alleged that "each and every Defendant acts as an IXC with regard to [the] calls" at issue in this lawsuit. *Complaint* at 8, line 3. Contrary to UniPoint's suggestion, that is sufficient for pleading purposes. There is no meaningful difference between pleading that these Defendants "act" as IXCs with regard to these long-distance calls, as opposed to pleading that they "are" IXCs, as UniPoint suggests is required. Tellingly, UniPoint cites no authority for this proposition. In truth, it is more accurate to state, as Qwest has done, that the Defendants "act" as IXCs with regard to the calls at issue here, because that is what is required. It does not matter if Defendants are IXCs for all purposes, nor does it matter how Defendants label or perceive themselves. What matters is their regulatory classification for purposes of their carriage of these calls. The law is clear that the classification of a provider turns not on how it classifies itself, or even its predominant line of business, but rather "on the particular practice under surveillance." *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

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For that same reason, even if an entity does offer enhanced services, it is an IXC where it offers interexchange service. Thus, regardless of what else they may do, when these Defendants provide long haul transport of interexchange traffic they are, for purposes of that traffic, IXCs.[44] In other words, with regard to such traffic they "act" as IXCs – exactly as Qwest has pled.[45] Accordingly, asking whether these Defendants "are" IXCs, for all purposes, is the wrong question. Evaluating the facts specific to the conduct and the call traffic at issue in this lawsuit is the proper inquiry.

2. *Defendants act as IXCs for purposes of the long-distance traffic at issue in this lawsuit.*

First, and most importantly, Qwest submits that this question cannot be adjudicated against Qwest on a motion to dismiss. Qwest has pled that these Defendants act as IXCs for purposes of the long-distance calls at issue here, and supported that allegation with factual allegations stating that each Defendant is, in fact, participating in the transport of long-distance traffic as described in the Complaint. Qwest has pled what facts it has at its disposal in that regard; it cannot know exactly how each Defendant has represented its service to its customers, what the contracts between each Defendant and their customers state, how each Defendant

[44] For this same reason, no extended discussion of the so-called "ESP exemption" liberally invoked by Defendants is required. Qwest has alleged that each of the Defendants here act as IXCs, not ESPs, and that is a fact-driven determination that is based on the particular conduct under scrutiny, and thus cannot be resolved against Qwest in a motion to dismiss. *Sw. Bell Tel Co.* at 1481. Whether Defendants are ESPs in other contexts is irrelevant. Defendants cannot don the "ESP Exemption" as a Kevlar vest that would shield them from access charge liability, no matter the conduct they are engaged in.

[45] Memorandum Opinion & Order, *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 18 (1987) (Under FCC's access rules, "entities that offer both interexchange services and enhanced services are treated as carriers with respect to the former offerings, but not with respect to the latter."). *See also Calling Card Order*, *supra* note 5, ¶ 14 ("[T]he relevant question is whether an entity is providing a single information service with communications and computing components or two distinct services, one of which is a telecommunications service." (internal quotations omitted)); *Wold Communications Inc. v. FCC*, 735 F.2d 1465, 1474-76 (D.C. Cir. 1984) (discussing the classification of satellite transponder services as common carrier versus non common carrier on a transponder by transponder basis).

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specifically provides that service to its customers, or how and where it takes that traffic from its customers. In similar fashion, Qwest does not and cannot know more than it has pled with regard to these Defendants' hand-off of this traffic to CLECs. The details on that end of the transaction are also uniquely in the possession of each Defendant.[46] All of those facts would bear on whether Defendants act as IXCs in their carriage of these calls, though Qwest submits that may already be apparent.

The Defendants are liable as "interexchange carriers" for Qwest's terminating access charges under the FCC's rules with respect to the calls at issue here. Access charges "shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." 47 C.F.R. § 69.5(b) (emphasis added).[47] Defendants' primary contention regarding Rule 69.5(b), as asserted in UniPoint's motion, is that they cannot be "interexchange carriers" because they are not "common carriers." In point of fact, Defendants are common carriers with regard to their carriage of this traffic, but that issue is academic.[48]

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[46] This is evidenced by the fact that Qwest only just learned that UniPoint has also been passing this traffic through Anovian. *Barnes Aff.* at ¶ 2.

[47] *See also IP-in-the-Middle Order*, *supra* note X, ¶ 14 & n.59 ("Under our rules, access charges are assessed on interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." (citing 47 C.F.R. § 69.5(b))). *See Id.* ¶15 n.63 (equating access service charges with the term "carrier's carrier charges" in 47 C.F.R. § 69.5(b)).

[48] The service at issue here is unquestionably a telecommunications service, not an enhanced service, because the FCC so found in the IP-in-the-Middle order. Defendants are an "integral part" of providing that service, and therefore they are a telecommunications service provider – and a common carrier, accordingly – for purposes of their activity here. It matters not whether they are a common carrier for all purposes (which is the tenor of Defendants' argument). *See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("[I]t has long been held that 'common carrier is such by virtue of his occupation,' that is by the actual activity he carries on. Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others." (quotation omitted)). It also matters not that they are offering their service on a wholesale, as opposed to a retail basis. Memorandum Opinion & Order, *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers may obtain Interconnection Under Section 251 of the Communications Act of 1934, as amended, to provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd. 3513, ¶ 12 (2007); Notice of Apparent Liability for Forfeiture, *Compass Global, Inc. Apparent Liability for Forfeiture*, 23 FCC Rcd. 6125, ¶ 14

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More importantly, Defendants are wrong in their contention that only "common carriers" can be "interexchange carriers." UniPoint would rewrite Rule 69.5 to have it apply to all "interexchange *common* carriers," but that is not what the rule says, and UniPoint can provide no authority for this rewriting of the rule. Within Rule 69.5 "interexchange" refers to non-access services provided (as here) as "an integral part of interstate or foreign telecommunications." 47 C.F.R. § 69.2(s). "Carrier" means just that – a carrier, whether a common carrier or private carrier. UniPoint attempts to isolate the word "carrier" from "interexchange" within Rule 69.5, in order to prop up its argument that "carrier" must mean "common carrier." That tinkering with the plain language of the rule cannot be supported by logic or FCC precedent. In point of fact, interexchange carriers can absolutely be private (as opposed to common) carriers.[49] The test is whether they are an "integral part" of providing the interstate or foreign telecommunications, and here, Defendants quite clearly are just that, as the last carriers transmitting the long-distance calls at issue between local exchanges.

3. *Based on FCC Rules, Precedent, and Policy; Qwest's federal and state tariffs; the filed rate doctrine; and 47 U.S.C. § 202 (a), Defendants are liable for access charges based on their carriage of the long-distance calls at issue in this lawsuit.*

Again, the FCC has been clear and consistent that access charges are applicable to *any* entity that avails itself of access services irrespective of whether that entity is a private carrier, common carrier, or even a non-carrier.[50] This logically follows the FCC's stated policy that "any service provider that sends traffic to the PSTN should be subject to similar compensation

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(2008) ("As we have previously stated, '[t]he definition of 'telecommunications services' long has been held to include both retail and wholesale services under Commission precedent.'" (quotations omitted)).

[49] *E.g.*, Memorandum Opinion & Order, *HAP Services, Inc. v. Southwestern Bell Telephone Co.*, 2 FCC Rcd. 2948, ¶ 15 (1987) ("The applicability of interstate carrier charges does not depend upon whether the entity taking service is a common carrier. If HAP carried interstate traffic for hire between two or more exchanges, interstate carrier access charges would apply.").

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obligations."[51] Allowing certain entities to utilize the PSTN for functionally equivalent services but not requiring equal payment would violate both the filed-rate doctrine and nondiscrimination principles at the foundation of the Communications Act. *See* 47 U.S.C. § 202(a); *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998) ("Regardless of the carrier's motive-whether it seeks to benefit or harm a particular customer-the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services."); *Brown v. MCI WorldCom Network Serv., Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002) (forbidding a carrier "from charging rates other than as set out in its filed tariff").[52] That, however, is the very result that Defendants lobby for here, in contending that they cannot be required to pay access charges where they utilize the PSTN to complete long-distance calls in the exact same fashion as other IXCs who do pay access charges.

Qwest is required by law to assess and collect, in a nondiscriminatory manner, its tariffed access service charges for the termination of PSTN-to-PSTN long-distance calls from all carriers providing interexchange service, including the Defendants. *See* 47 U.S.C. § 202(a). The filed-rate doctrine and § 202(a) of the Communications Act require common-carriers, like Qwest, to assess nondiscriminatory charges for functionally equivalent services. *E.g.*, *Ad Hoc Telecomm. Users Comm. v. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982); *Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998); *MCI Telecomm. Corp. v. FCC*, 712 F.2d 517, 536 (D.C. Cir. 1983) (holding that disparate rates charged for like access services were unlawfully discriminatory).

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[50] *Id.*

[51] *IP-in-the-Middle Order*, *supra* note 2, ¶ 11 n.47; NPRM, *IP-enabled Services*, 19 FCC Rcd. 4863, ¶ 33 (2004).

[52] Memorandum Opinion & Order, *Bell Atlantic Petition for Declaratory Ruling Concerning Application of the Commission's Access Charge Rules to Private Telecommunications Systems*, 2 FCC Rcd. 7458, ¶ 5 (1987) ("The goals of [the FCC's] access charge plan include the elimination of unreasonable discrimination and undue preferences among rates for interstate services.").

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Here, the long-distance calls carried by the Defendants are more than just the "functional equivalent" of the ordinary long-distance calls carried by other interexchange carriers; they are, in fact, utterly indistinguishable from ordinary long-distance calls carried by other interexchange carriers. Whether the disputed calls are transported utilizing IP communications technology or not is irrelevant. To the end-user (*i.e.*, the called or calling party), as Qwest has pled, no functional difference exists between an end-to-end circuit-switched long-distance call and an IP-in-the-Middle long-distance call. *Complaint* at 11, lines 18-22. Defendants utilize Qwest's local exchange network to terminate the disputed long-distance calls in the same manner and for the same purpose as other carriers providing interexchange service and therefore, are subject to the same access service charges paid by other interexchange service providers. Allowing Defendants to evade the payment of access charges would create an unlawful preference for the Defendants, and unreasonably discriminate against other carriers providing interexchange service. Consistent with the filed-rate doctrine and § 202(a), Qwest is required to collect its access service charges from the Defendants.

This was in fact the principal concern, and a primary rationale behind the FCC's order, in the IP-in-the-Middle-case. The FCC in that docket expressly noted that it was necessary to ensure that no carrier was placed at a "competitive disadvantage," and that its order sought "to remedy the current situation in which some carriers may be paying access charges for these services while others are not."[53] The FCC also considered and responded to concerns that requiring only AT&T to pay access charges, while not requiring other IP-in-the-Middle providers to do so as well, could also cause discrimination. The FCC's discussion in that regard is quite informative here:

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> Commenters argue that it is inequitable to impose access charges on AT&T's specific service if access charges do not apply to other types of IP-enabled voice services. The Commission is sensitive to the concern that disparate treatment of voice services that both use IP technology and interconnect with the PSTN could have competitive implications . . . .
>
> Our analysis in this order applies to services that meet these criteria regardless of whether one interexchange carrier uses IP transport or instead multiple service providers are involved in providing transport. *Thus our ruling here should not place AT&T at a competitive disadvantage.*[54]

Clearly the FCC did not have in mind that AT&T would be required to pay access charges for calls carried by its IP-in-the-Middle service, while IXCs providing wholesale IP-transport (like Defendants here) would not. Nonetheless, that is the very result for which Defendants campaign.

These same FCC policies and nondiscrimination requirements compel Defendants' payment of access charges, notwithstanding that Defendants are not directly interconnected with Qwest's local exchange network. Defendants are not insulated from liability simply because they are connected with Qwest's local exchange network through an intermediate CLEC. Under the constructive ordering doctrine, a party's liability for a tariffed service (such as exchange access service) is established despite not directly ordering or using the service when the receiver of the service: "(1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services." *E.g., Advamtel, LLC v. AT&T*, 118 F.Supp.2d 680, 687 (E.D. Va. 2000).[55]

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[53] *IP-in-the-Middle Order, supra* note 2, ¶ 19.

[54] *Id.* (emphasis added) (citations omitted).

[55] *See also* Fifth Report & Order, *Access Charge Reform*, 14 FCC Rcd. 14221, ¶ 188 (1999) ("In United Artists, the Commission found that affirmative consent was unnecessary to create a carrier-customer relationship when a carrier is interconnected with other carriers in such a manner that it can expect to receive access services, and when it fails to take reasonable steps to prevent the receipt of access services and does in fact receive such services."). Contrary to UniPoint's assertion, *Advamtel, LLC v. Sprint Commc'ns Co. L.P.*, 125 F.Supp.2d 800 (E.D. Va. 2001) does not support the notion that predicate constructive-ordering determinations must be made by the FCC. *UniPoint Mot.* at 18 n.10. The questions referred to the FCC in *Advamtel, LLC v. Sprint Communications Co. L.P.* were 1) whether

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Here, the Defendants are interconnected to Qwest through an intermediate CLEC. *Complaint* at 9 lines 16-19. Since the called parties were Qwest local exchange customers, Defendants could only expect that the CLEC would route these calls to Qwest for termination. In fact, they clearly intended so. *Complaint* at 13, lines 1-5. Otherwise, the long-distance calls carried by the Defendants would never be completed, and Defendants would, practically speaking, have no business. It would clearly not be possible for Defendants to offer long-distance terminations services to other interexchange carriers, *Complaint* at 14, lines 14-21, if they could not, in fact, cause the calls to be terminated to the intended end users to whom the calls were placed. Further, by delivering the long-distance calls to the intermediate CLEC with full knowledge that the CLEC would route the calls to Qwest for termination, the Defendants have failed to take any reasonable steps to prevent the receipt of access services. Again, far from taking any steps to *avoid* receiving access services, Defendants acted to *ensure* that they received such access services, as described above. Lastly, because Qwest terminated the Defendants' long-distance calls, the Defendants did in fact receive access services. *E.g.*, *Complaint* at 18, line 11.

4. *There is no basis to defer to the primary jurisdiction of the FCC regarding Defendants' liability for access charges for the long-distance calls at issue here; this Court is competent to apply settled law to make that determination.*

UniPoint relies heavily on the decision in *Southwestern Bell Telephone, L.P. v. Vartec Telecom, Inc.*, No. 4:04 CV 1303, 2005 WL 2033416 (E.D.Mo. 2005) ("*Vartec*") to support its

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an interexchange service may legally refuse the access services of local exchange carrier and 2) what steps are necessary to cancel service. *Sprint Commc'ns Co. L.P.*, 125 F.Supp.2d at 804; *see also* Declaratory Ruling, *AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charges*, 16 FCC Rcd. 19158, ¶ 1 (2001) (addressing the questions referred by the district court), *vacated by AT&T v. FCC*, 292 F.3d 808, 812-13 (D.C. Cir. 2002). Neither question is relevant to the present case at this time. Defendants did not attempt to refuse or cancel Qwest's access services with respect to the long-distance calls at issue.

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argument for deference to the primary jurisdiction of the FCC in this case. *UniPoint Mot.* at 19 lines 1-8. In *Vartec*, SBC (now AT&T) sought payment of access charges from UniPoint and Transcom. *Vartec Telecom, Inc.*, 2005 WL 2033416, at *4. The district court dismissed that case in deference to the primary jurisdiction of the FCC and held that "in order to determine whether the UniPoint Defendants are obligated to pay the tariffs in the first instance, the Court would have to determine either that the UniPoint Defendants are IXCs or that access charges may be assessed against entities other than IXCs." *Id.* That rationale does not apply here.

As Qwest outlined in the previous section, there is ample legal and factual support to establish Defendants here do act as IXCs with regard to their carriage of the long-distance calls at issue in this lawsuit. There is no basis for the Court to seek guidance from the FCC on this issue, and this Court is perfectly competent to make this determination. Qwest respectfully submits that the *Vartec* court was simply wrong in believing that it needed – or could expect to receive – guidance from the FCC on these issues. That is perhaps most amply demonstrated by the events that took place after the *Vartec* court rendered its decision and stayed that lawsuit. Shortly after that decision SBC, with no other meaningful recourse, filed a petition for a declaratory ruling at the FCC involving these same issues.[56] More than 3 ½ years have now passed since SBC made that filing, and yet that docket remains open at the FCC, unresolved.

Defendants maintain that this open docket at the FCC militates in favor of staying this lawsuit in deference to the primary jurisdiction of the FCC. Qwest suggests that this lanquishing FCC docket should lead this Court to precisely the opposite conclusion. Where an agency has

[56] SBC ILECS, Petition for Declaratory Ruling that UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers are Liable for Access Charges, FCC, WC Docket No. 05-276 (filed Sept. 21, 2005).

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provided settled law, the court should refuse to invoke the doctrine of primary jurisdiction because to invoke the doctrine "would postpone the resolution of the [plaintiff's] claim indefinitely." *U.S. v. Dan Caputo Co.*, 152 F.3d 1060, 1062 (9th Cir. 1998). Clearly the resolution of SBC's claims have been postponed indefinitely by the *Vartec* court's referral of that matter to the FCC. It is not surprising, perhaps, that the FCC has not resolved that SBC petition for the simple fact that the guidance sought therein has already been provided—repeatedly—by the FCC, as Qwest has outlined herein.

D. The FCC's Track Record of Egregious Delay Further Weighs Against the Court's Application of the Primary Jurisdiction Doctrine

Staying this lawsuit in deference to the primary jurisdiction of the FCC would serve no purpose, other than to needlessly delay resolution of this dispute. This Court should take heed of the often neglected axiom: justice delayed is justice denied. The FCC's track record of delay in providing guidance as an expert agency, along with considerations of judicial economy further weigh against this Court deferring to the primary jurisdiction of the FCC. This is particularly true given that the FCC has *already* provided the necessary law to resolve this dispute, as discussed above. As the Second Circuit has recognized in determining the appropriate application of the primary jurisdiction doctrine, "considerations of judicial economy overlap to a certain extent with those of agency expertise." *Tassy v. Brunswick Hosp. Center, Inc.*, 296 F.3d 65, 75 (2nd Cir. 2002) (Walker, C.J., dissenting) (citing *Johnson v. Nyack Hosp.*, 964 F.2d 116, 123 (2d Cir. 1992)).

The FCC's delay on the SBC petition previously discussed is just one of several examples of the FCC's well documented track record for extreme delay that is often criticized and rarely justified. *E.g.*, *In re Core Commc'ns, Inc.*, 531 F.3d 849 at 850, 858 (D.C. Cir. 2008)

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(finding the FCC's promise to complete comprehensive intercarrier compensation reform hollow and unconvincing, and observing: "It has been three years since we dismissed Core's first petition and six years since we remanded the case to the FCC to do nothing more than state the legal justification for its rules. At this point, the FCC's delay in responding to our remand is egregious."). Deference to the primary jurisdiction of the FCC is unwarranted and would cause needless delay and undermine the principle of judicial economy.

E. In Any Event, Any Changes by the FCC to the Intercarrier Compensation Regime Will Only be Prospective and Will Not Change the Rights and Obligations of the Parties in the Present Dispute

Any departure from the FCC's existing precedent and clear policy regarding the application of access service charges to IP-in-the-Middle calls will only be prospective and, therefore, would have no effect on the rights and obligations of the parties in the present dispute. The FCC has made clear that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations" and that "the cost of the PSTN should be borne equitably among those that use it in similar ways."[57] As discussed above, the FCC has also made clear through *IP-in-the-Middle Order* and its progeny, that a carrier's use of IP transport does not exempt the carrier from payment of access service charges. A number of open dockets at the FCC may eventually bring about comprehensive intercarrier compensation reform, including a major reworking of access charges, but any such major reform will only be prospective.[58] For instance, in its most recent proposed rulemaking relating to intercarrier compensation issues, the FCC has proposed phasing out originating access charges.[59] If Qwest were to bring a lawsuit

[57] *E.g.*, NPRM, *IP-Enabled Services*, 19 FCC Rcd. 4863, ¶ 61 (2004).
[58] *Nov. 5, 2008 FNPRM*, *supra* note 3, Appendix A, ¶¶ 190-197 & Appendix C, ¶¶ 185-192 (outlining and detailing a ten year transition plan to achieve a uniform intercarrier termination rate).
[59] *Id.* Appendix A, ¶ 229 ("[W]e find that originating charges for all telecommunications traffic subject to our comprehensive intercarrier compensation framework must be eliminated at the conclusion of the transition to the

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today to collect such originating switched access charges from a defendant, that defendant could not oppose that action by arguing that the FCC is considering eliminating, prospectively, originating access charges. Nor could that defendant invoke primary jurisdiction by arguing that the rule regarding originating switched access might be in flux. The fact that the FCC is considering comprehensive intercarrier compensation is irrelevant to the resolution of the present dispute.

F. In the Alternative, this Court Should Allow the Case to Proceed at Least with Respect to the Misrouted Long-Distance Calls that Never Involved IP Transport and Stay Rather than Dismiss Qwest's Claims

Even if this Court finds it appropriate to apply the primary jurisdiction doctrine to the IP-in-the-Middle calls, this Court should allow the claims to proceed for the portion of calls that did not involve IP-transport. Qwest has alleged that some portion of the calls at issue were never converted to IP format and "remain[ed] in circuit switched format for the entire call path." *Complaint* at 11 line 20-22. Irrespective of the applicability of the primary jurisdiction doctrine to IP-in-the-Middle calls, the Court should not dismiss (or stay) the portion of the claims related to calls that never involved an IP conversion. *S. New Eng. Tel. Co. v. Global Naps, Inc.*, No. Civ.A. 304CV2075JCH, 2005 WL 2789323, at *6 (D. Conn. 2005) ("[T]he court does not stay [under the doctrine of primary jurisdiction] SNET's misrouting claims to the extent that they only involve 'traditional' voice calls that do not involve IP.").

If, nonetheless, the Court decides to defer to the primary jurisdiction of the FCC, Qwest requests that the Court stay rather than dismiss its claims as they relate to IP-in-the-Middle calls. "[W]here the court suspends proceedings to give preliminary deference to an administrative

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new regime. . . . For these reasons, we ask parties to comment on the appropriate transition for eliminating originating access charges in the accompanying Further Notice.").

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agency but further judicial proceedings are contemplated, then jurisdiction should ordinarily be retained via a stay of proceedings, not relinquished via a dismissal." *Davel Commc'ns, Inc.*, 460 F.3d at 1091. In the previously referenced *Greene* case involving early termination fees for wireless contracts, this Court, following that guidance from *Davel Communications*, stayed rather than dismissed that lawsuit. *Greene,* 2008 WL 3561017, at *4. The Court also recognized that, even where deferral to the FCC under primary jurisdiction is appropriate, that does not end the court's involvement with the matter. *Id.* Accordingly, in *Greene*, this Court ordered the parties to provide a joint status report within 180 days of the Court's order imposing the stay, advising the Court of the status of the proceedings before the FCC. *Id.* If the Court is inclined here to enter a stay and refer this matter to the FCC under primary jurisdiction, Qwest submits that it should do the same and, in fact, go further. Given the FCC's track record of egregious delay relating to action on these types of intercarrier compensation issues, Qwest submits that if the Court grants the Defendants' motion to stay this lawsuit under primary jurisdiction, the Court should make clear that this stay will remain in place for only one year from the date of the order, to ensure that this matter does not merely become "parked" at the FCC.

VII. RESPONSE TO MOTION TO DISMISS QWEST'S FRAUD CLAIM

A. Qwest has Pled Each and Every Necessary Element of a Fraud Claim under Washington Law as Well as the Laws of the Other Four States in which Defendants' Fraudulent Conduct Occurred

Defendant Broadvox asserts that Qwest's fraud claim should be dismissed for failure to plead all required elements. Qwest has pled each and every necessary element of a fraud claim under the law of each state in which Qwest has alleged that the Defendants have fraudulently sent long-distance calls to Qwest for termination. Qwest has alleged that each Defendant

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fraudulently sent calls to Qwest for termination in at least five states: Washington, Arizona, Idaho, Oregon, and Utah. *Complaint* at 18, lines 4-6 & 19 lines 6-8.

The necessary elements of a fraud claim are controlled by the applicable state law. *E.g.*, *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). "In determining what state law to apply, a federal court applies the choice-of-law rules of the state in which it sits." *Kohlrautz v. Oilmen Participation Corp.*, 441 F.3d 827, 833 (9th Cir. 2006). Here, the Court sits in Washington, which follows the Restatement (Second) of Conflicts of Law in determining the appropriate state law to apply to a fraud claim. *See, e.g., Payne v. Saberhagen Holdings, Inc.*, 190 P.3d 102, 109 (Wash. Ct. App. 2008) (citing *Johnson v. Spider Staging Corp.*, 555 P.2d 997, 1000 (Wash. 1976)); *Kammerer v. W. Gear Corp.*, 618 P.2d 1330, 1336 (Wash. Ct. App. 1980) (relying on Restatement (Second) of Conflict of Laws § 148 to determine which state's law will govern a fraud claim). In a fraud claim, the law of the state where the plaintiff's reliance took place and where the defendant's false representations were made determines the rights and liabilities of the parties. Restatement (Second) of Conflicts of Law § 148(1) (1971).

Here, irrespective of the applicable state law, Qwest has pled each and every necessary element of a fraud claim.[60] For instance, under Washington law, the elements of fraud are:

> (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

[60] *Adams v. King County*, 192 P.3d 891, 902 (Wash. 2008) (en banc) (specifying the elements of a fraud claim under Washington law); *Enyart v. Transamerica Ins. Co.*, 985 P.2d 556, 562 (Ariz. Ct. App. 1998) (specifying the elements of a fraud claim under Arizona law); *Chavez v. Barrus*, 192 P.3d 1036, 1047 (Idaho 2008) (specifying the elements of a fraud claim under Idaho law); *Estate of Schwarz v. Philip Morris Inc.*, 135 P.3d 409, 422 (Or. Ct. App. 2006) (specifying the elements of a fraud claim under Oregon law); *Giusti v. Sterling Wentworth Corp.*, 201 P.3d 966, 977 n.38 (Utah 2009) (specifying the elements of a fraud claim under Utah law).

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Adams v. King County, 192 P.3d 891, 902 (Wash. 2008) (en banc). Broadvox asserts that Qwest has, in particular, failed to plead the first element – "representation of an existing fact." *Broadvox Mot.* at 13 lines 12-15. The federal rules, however, do not require pleading fraud claims or other claims under a rigid technical formula or with particular "magic words." *See, e.g., Castillo v. Norton*, 219 F.R.D. 155, 159 (D. Ariz. 2003) ("Technical forms of pleading are not required. Rather, Rule 8 is designed to discourage battles over mere form of statement . . . ." (internal quotations and citations omitted)); *Romine v. Acxiom Corp.*, 296 F.3d 701, 710 (8th Cir. 2002) ("To dismiss plaintiffs' claim because they fail to state the magic words . . . is improper and inconsistent with the liberal pleading requirements of Fed.R.Civ.P. 8(a)(2)."); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1298 (3d ed. 2009 update). With that said, Qwest has sufficiently pled the first element as well as each and every other element of a fraud claim under Washington Law and the law of the four other states.

With respect to the first and third elements, "representation of an existing fact" and "falsity," Qwest pled that "Defendants . . . misrepresent[ed] that these long-distance calls are local calls . . . ." *Complaint* at 3, line 21.

With respect to the second element, "materiality," Qwest pled that:

> Defendants thereby evade payment of the terminating switched access charges applicable to long-distance calls for many millions of calls. This is significant because the charges that Qwest imposes, per its tariffs, to transport and terminate a long-distance call are higher than the charges, if any, that Qwest is entitled to impose to transport and terminate local calls.

Id. at 4, lines 10-14.

With respect to the fourth element, "the speaker's knowledge of its falsity," Qwest pled that each and every Defendant "intentionally caus[ed] those long-distance calls to be misrouted . . . ." *Id.* at 3, line 19.

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With respect to the fifth element, "intent of the speaker that it should be acted upon by the plaintiff," Qwest pled that "Defendants do so with the express intent that the CLEC misroute the long-distance traffic as local traffic to Qwest for termination . . . ." *Id.* at 12 lines 20-22. Further, Qwest pled that "each defendant . . . knows and in fact intends that Qwest will terminate these calls by providing Qwest's terminating access services." *Id.* at 13, lines 3-5.

With respect to the sixth element, "plaintiff's ignorance of its falsity," Qwest pled that "[Defendants] prevented Qwest from distinguishing between local traffic that was lawfully passed through LIS trunks, and interexchange long-distance traffic that was unlawfully passed through these facilities." *Id.* at 13, lines 12-14. Further, Qwest pled that "[b]y causing long-distance traffic to be sent through local only facilities, however, each Defendant knowingly and intentionally circumvents Qwest's ability to properly identify this traffic as long-distance, and impose appropriate tariffed charges for terminating switched access services." *Id.* at 13, lines 6-9. Finally, Qwest pled that it "was able to learn the identity of the Defendant responsible for the traffic only from the CLEC sending that traffic to Qwest over its LIS trunk connections with Qwest," and that "the full extent of this long-distance traffic for which Defendants are avoiding Qwest's terminating switched access charges is much greater than what Qwest has been able to discover." *Id.* at 13, lines 16-22.

With respect to the seventh element, "plaintiff's reliance on the truth of the representation," Qwest pled that it was "unable to bill for (or, in many cases, even to detect or measure) a great deal of interexchange voice traffic delivered by the Defendants for termination." *Id.* at 13, lines 14-16.

With respect to the eighth element, "plaintiff's right to rely upon it," Qwest pled that "rather than delivering these calls directly to Qwest as long-distance calls, Defendants deliver

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them instead to an intermediate CLEC by way of a local service designed for the exchange of local traffic, typically a primary rate interface ("PRI") service." *Id.* at 9, lines 16-19. "In turn, the intermediate CLEC then routes the disguised long-distance traffic to Qwest . . . by way of LIS trunks . . . ." *Id.* at 9, line 22 – 10, line 1. "The [LIS] interconnection agreement specifies, and expressly limits, the type of traffic that the CLEC may send to Qwest over these LIS trunks. Specifically, the CLEC is not permitted to send to Qwest long-distance traffic originated by other carriers." *Id.* at 3, lines 12-16.

With respect to the ninth element, "damages suffered by the plaintiff," Qwest pled that it "seeks . . . to recover the terminating access charges that Defendants have unlawfully avoided – which Qwest preliminarily estimates to be in excess of $6 million, collectively, not including late fees and interest . . . ." *Id.* at 4, lines 16-18. Qwest has pled each and every element of a fraud claim under Washington law.

B. Qwest Has Pled with Sufficient Particularity the Circumstances that Constitute Fraud to Meet the Pleading Standard under Fed. R. Civ. P. 9(b)

Qwest has pled with sufficient particularity the circumstances that constitute fraud for each and every Defendant to enable each Defendant to prepare an adequate answer. *Lewis v. Berry*, 101 F.R.D. 706, 708 (W.D. Wash. 1984) ("In this circuit, a pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." (quotations omitted)). In addition, the Court of Appeals for the Ninth Circuit has held that "the general rule that allegations of fraud based on information and belief do not satisfy Rule 9(b) may be relaxed with respect to matters within the opposing party's knowledge. In such situations, plaintiffs can not be expected to have personal knowledge of the relevant facts." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (citations omitted);

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Concha v. London, 62 F.3d 1493, 1503 (9th Cir. 1995) ("Even in cases where fraud is alleged, we relax pleading requirements where the relevant facts are known only to the defendant."); *Corley v. Rosewood Care Center, Inc.*, 142 F.3d 1041, 1051 (7th Cir. 1998) ("[T]he particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim . . . ."). Furthermore, the Court should not test the evidence at this stage. *Cooper v. Picket*, 137 F.3d 616, 627 (9th Cir. 1997).

Here, Qwest has provided the Defendants with more than sufficient specificity of the circumstances that constitute fraud to prepare an adequate answer, especially in light of the fact that the particulars of the fraud are uniquely within the knowledge of the Defendants. *Complaint* at 25, lines 3-4. Qwest explained how each and every Defendant passed long-distance calls over a "local PRI service" purchased from an intermediate CLEC, knowing and in fact intending that the CLEC would, in turn, pass the long-distance calls to Qwest for termination by way of facilities dedicated to local traffic. *E.g.*, *Complaint* at 9-14 & 23-25. Based on the Defendants' misrouting of long-distance calls, they were able to fraudulently avoid payment of Qwest's access charges. *See id.* at 24, lines 13-15. The Court should not test the sufficiency of the evidence at this stage of the case, but only ensure that Defendants are provided with sufficiently particular circumstances to enable the Defendants to prepare an adequate answer. Qwest has pled those facts that it has, with the specificity possible, with regard to the Defendants' fraudulent conduct.

C. In the Alternative, Qwest Seeks Leave to Amend its Complaint, if the Court Finds that Qwest Has Not Met the Rule 9(b) Pleading Standard

If the Court concludes that Qwest has not pled with sufficient particularity the circumstances constituting fraud or has failed to plead a necessary element, Qwest seeks leave

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from the Court to amend its Complaint. "Rather than dismissing a case under Rule 9(b)[,] it is preferable that the district court grant plaintiff leave to amend the complaint . . . ." *Fidelity Mortg. Corp. v. Seattle Times Co.*, 213 F.R.D. 573, 576 (W.D. Wash. 2003). This conclusion is supported by the policy underlying Fed. R. Civ. P. 15(a) to readily allow parties to amend pleadings. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) ("Generally, Rule 15 advises the court that 'leave shall be freely given when justice so requires.' This policy is 'to be applied with extreme liberality.'").

VIII. RESPONSE TO MOTION TO DISMISS BASED ON THE FILED-RATE DOCTRINE

It is well-established that the filed-rate doctrine does not serve as a "shield" staving off claims based on state law. *See Am. Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 230-31 (1998) (C.J. Rehnquist, concurring); *Lovejoy v. AT&T Corp.*, 92 Cal.App.4th 85, 100 (Cal. Ct. App. 2001). In turn, UniPoint's assertion that Qwest's state law claims are barred by the filed-rate doctrine misconstrues the purpose and scope of that doctrine.

The filed-rate doctrine bars all claims "that attempt to challenge the terms of a tariff that [an agency] has reviewed and filed." *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1170 (9th Cir. 1166) (internal quotation marks and citation omitted). As a result, a claim seeking to *alter* or *change* the terms of a tariff runs afoul of the filed-rate doctrine and is preempted. *See, e.g., Am. Tel. & Tel. Co.*, 524 U.S. at 229 (C.J. Rehnquist, concurring) ("for the filed rate doctrine to serve its purpose, therefore, it need pre-empt *only* those suits that seek to alter the terms and conditions provided in the tariff.") (emphasis added); *Brown*, 277 F.3d at 1170. Moreover, the filed-rate doctrine might preclude courts from deciding whether a tariff is reasonable, but it does not preclude courts from interpreting the provisions of a tariff and

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enforcing that tariff. *See Brown*, 277 F.3d at 1171-72; *In re NOS Communications, MDL No. 1357*, 495 F.3d 1052, 1057 (9th Cir. 2007).

In this case, Qwest's state law claims – fraud, tortious interference, and unjust enrichment – seek redress for misconduct that falls *outside* the scope of the tariff. As such, these claims are not barred by the filed-rate doctrine. *See, e.g., Am. Tel. & Tel. Co.*, 524 U.S. at 230 (C.J. Rehnquist, concurring) (stating that a tariff "does not affect whatever duties state law might impose on [one party] to refrain from intentionally interfering with [another party's] relationships with its customers . . ."); *Ind. Bell Tel. Co. v. Ward*, No. IP 02-170-C, 2002 WL 32067296, at *6 (S.D. Ind. 2002) (holding that a common law fraud claim arising out of the allegation that carriers "cheated plaintiffs out of the [access] fees that they owed" was not preempted by the filed-rate doctrine.); *Coop. Commc'ns, Inc. v. AT&T Corp.*, 867 F.Supp. 1511, 1519 (D. Utah 1994) (filed-rate doctrine does not bar state law claims for intentional interference with prospective economic relations and business disparagement resulting from alleged misrepresentations).

Further, the fundamental premise underlying the filed-rate doctrine—namely, preventing discrimination—would not be served, but rather undermined, by allowing Defendants to invoke the doctrine here. *See Brown*, 277 F.3d at 1170 (quoting *Am. Tel. & Tel. Co.*, 524 U.S. at 214). If the Defendants cannot be called to account for their conduct, they will have a virtual license to receive Qwest's terminating switched access services at a non-tariffed, discount rate. This will disserve the filed-rate doctrine to the detriment of other IXCs, who are properly compensating Qwest for its tariffed switched access charges on long-distance traffic. Further, allowing Defendants to invoke the filed-rate doctrine to avoid liability for access charges, while other

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IXCs like AT&T continue to pay access charges, would run completely contrary to the FCC's guidance in the *IP-in-the-Middle Order* that "our ruling here should not disadvantage AT&T."[61]

IX. RESPONSE TO MOTION TO DISMISS UNJUST ENRICHMENT CLAIM

A. Qwest's Complaint States a Claim for Unjust Enrichment

Qwest's complaint satisfies each element of unjust enrichment under Washington law. Under Washington law, there are three elements that must be established for a claim of unjust enrichment: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value. *Baillie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 810 P.2d 12, 18 (Wash. Ct. App. 1991).

In this case, Qwest has alleged that Defendants obtained terminating access service and caused long-distance calls to be delivered to Qwest as local traffic. *Complaint* at 20, lines 5-8. That service, in turn, created a benefit that inured to the Defendants through substantially lower termination rates. *Id.* at 20, lines 9-12. Defendants understood that the termination of misrouted long-distance calls by Qwest was important to the Defendants' customers, and they accordingly appreciated and recognized that Qwest's termination of long-distance calls conferred a benefit upon them. *Id.* at 20, lines 13-15. And, Defendants accepted and retained that benefit without paying reasonable value for the access service obtained. *Id.* at 20, lines 16-19. These allegations state a claim for unjust enrichment.

[61] *IP-in-the-Middle Order, supra* note 2, ¶ 19.

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Transcom argues that it did not receive any benefit from Qwest. *Transcom Mot.* at 16, lines 17-25. But the Defendants' business models are based on the transportation and delivery of long-distance calls for termination by Qwest and other local exchange carriers. *Transcom Mot.* at 6, lines 9-12. By obtaining termination of these long-distance calls for their customers, Transcom and the other Defendants do make use of a service provided by Qwest. Indeed, in the absence of Qwest's provision of service to the Defendants, calls transported and delivered by the Defendants could not be terminated to Qwest's local customers. If Qwest did not complete these long-distance calls being sent to them by Defendants, in point of fact, Defendants would not have a viable business model. No upstream interexchange carrier would contract with one of the Defendants if that meant that the long-distance traffic being carried by that interexchange carrier could not be completed to the intended end user customer. By failing to pay the legally required tariff rate for the termination of these calls, the Defendants are receiving a benefit from Qwest.

Finally, Transcom's assertion that Qwest improperly pled unjust enrichment instead of quantum meruit is a red herring. *Transcom Mot.* at 17, lines 1-9. As an initial matter, Qwest's complaint specifically indicates that recovery under the unjust enrichment theory is sought "in the alternative," which is wholly appropriate under the Federal Rules. *See Complaint* at 20, line 1; Fed. R. Civ. P. 8(e)(2). Moreover, Transcom's reliance on the *Young* decision is misplaced. That case explained the distinction between unjust enrichment and quantum meruit due to the court's observation that "Washington courts have historically used these terms synonymously." *Young v. Young*, 191 P.3d 1258, 1261 (Wash. 2008). The *Young* court explained that "unjust enrichment is the method of recovery for the value of the benefit received absent any contractual relationship because notions of fairness and justice require it." *Id.* at 1262. On the other hand, the court explained that a "contract implied in fact" under *quantum meruit* can be established if:

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(1) the defendant requests work, (2) the plaintiff expects payment for work, and (3) the defendant knows or should know the plaintiff expects payment for the work. In this case, an unjust enrichment claim under Qwest's alternative theory for relief is more appropriate because the Defendants claim they have never explicitly ordered *anything* from Qwest. *Transcom Mot.* at 5, lines 8-11. Instead, the Defendants received a benefit by deceptively misrouting calls to be terminated by Qwest at substantially lower rates, and it is the Defendants' receipt of these benefits that form the nucleus of Qwest's alternative unjust enrichment claim.

B. Reciprocal Compensation Payments Do Not Offset Qwest's Claim for Unjust Enrichment

Similarly misleading is Transcom's argument that Qwest has "as a matter of law" received "reasonable payment" for the termination of long-distance calls through reciprocal compensation. *See Transcom Mot.* at 17, lines 19-21. First, as a matter of common sense, the fact that Qwest might have received a fraction of the payment to which it is due does not offset a claim of unjust enrichment. Thus, in those instances where Qwest has received reciprocal compensation for the traffic at issue here, it has not received payment to which it is due, and Defendants are accordingly unjustly enriched. *Complaint* at 4, lines 11-14.

X. RESPONSE TO MOTION TO DISMISS TORTIOUS INTERFERENCE CLAIM

Defendants have moved to dismiss Qwest's claim for tortious interference with contractual relationship or business expectancy. In so doing, Transcom claims that "[t]he idea that failing to pay Qwest interferes with Qwest's contract with some third party simply does not make sense." *Transcom Mot.* at 20, lines 1-2. Transcom should reread Qwest's complaint, because the gist of Qwest's claim is *not* based on Defendants' failure to pay. Qwest's claim *is*,

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however, based on Qwest's non-receipt of payments, or at a minimum receipt of payments that were significantly less than Qwest was entitled to *as a result of* Defendants' conduct.

Qwest has adequately alleged each element of its tortious interference claim. Instead of rehashing each element of that claim here, Qwest's claim (which is pled in the alternative) applies to the extent that (1) any of the Defendants maintain that their interexchange customers, rather than the Defendants themselves, are the parties liable to Qwest for terminating switched access charges pursuant to Qwest's federal and state tariffs, and (2) the Defendants are not found to be directly liable to Qwest for payment pursuant to those tariffs. *Complaint* at 21, lines 13-18. Based on their claim that they are not interexchange carriers, and therefore cannot be made to pay access charges (so the argument runs), the Defendants appear to suggest that Qwest is owed access charges by the Defendants' own IXC customers. *See, e.g., Transcom Mot.* at 5, lines 4-7 ("[O]nly Interexchange Carriers owe access charges based on their obligations under tariffs to the CLEC or ILEC with whom they have a relationship."). Thus, *but for* the Defendants' intervention in this case, normal call flow patterns and payment systems between interexchange carriers and local exchange carriers would have been maintained. The Defendants' purposeful and tortious intervention in the call stream prevented the realization of the prospective business expectancy that otherwise would have existed in Qwest's business relationships. *See Newton Ins. Agency v. Caledonian Ins. Group*, 52 P.3d 30, 33 (Wash. Ct. App. 2002) (A valid business expectancy "includes any prospective contractual or business relationship that would be of pecuniary value.").

XI. RESPONSE TO MOTION TO DISMISS DECLARATORY JUDGMENT CLAIM

Defendants' motion to dismiss Qwest's declaratory judgment claim is apparently an attempt to limit the remedial discretion of this Court. In particular, Transcom argues that the

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issues raised in Qwest's declaratory relief claim are redundant with the issues that must be addressed in connection with Qwest's other causes of action. *Transcom Mot.* at 20, lines 21-23. It is not entirely clear what Transcom means here, since Transcom fails to identify areas of overlap. Transcom also makes a sweeping assertion that declaratory relief would not settle this matter because Qwest has already alleged damages and seeks monetary and injunctive relief. *Id.* at 20, lines 23-25.

In bringing its declaratory judgment claim, Qwest is seeking to clarify the relationship of the parties to this lawsuit by ensuring that the Defendants' misrouting of traffic and fraudulent conduct will not persist. In so doing, Qwest is not asking this Court to resolve factual questions that will be resolved under other causes of action. *See Celador Int'l Ltd. v. The Walt Disney Co.*, 347 F.Supp.2d 846, 857 (C.D. Cal. 2004) (citing *Newton v. State Farm Fire & Casualty Co.*, 138 F.R.D. 76, 79 (E.D. Va. 1991)). Nor is Qwest asking that Transcom and the other Defendants be found liable to Qwest for damages through the vehicle of a declaratory judgment. Rule 57 specifically provides that the existence "of another adequate remedy does not preclude a judgment for declaratory judgment in cases where it is appropriate." Fed. R. Civ. P. 57. This language, as well as language in the Declaratory Judgment Act that a declaratory judgment may be granted "whether or not further relief is or could be sought," establishes that "declaratory relief is alternative or cumulative and not exclusive or extraordinary." 28 U.S.C. § 2201; 10B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2758 (3d ed. 2009 update) (quoting the Advisory Committee Note to Rule 57 as originally adopted). In short, it would be premature for this Court to limit its remedial discretion at this early stage of litigation.

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XII. RESPONSE TO MOTION TO DISMISS BASED ON TRANSCOM'S BANKRUPTCY PROCEEDINGS

A. The Bankruptcy Court's Decisions Do Not Establish that Transcom is an ESP

Transcom argues that Qwest's claims against the Transcom Defendants prior to June 16, 2006 are barred by Transcom's previous bankruptcy proceeding. *Transcom Mot.* at 1, lines 14-17. In so doing, Transcom relies heavily on "three separate rulings" that, according to the Defendants, establish "unequivocally" that Transcom is an ESP. *Id.* at 2, lines 9-11; *see also Birdwell Aff.*, Exhibits A-C. This is simply not the case, and in any event, the bankruptcy court's rulings in that regard flatly contradict the FCC's ruling in the *IP-in-the-Middle Order.*

In the first place, Transcom acknowledges that the first of these rulings – a Memorandum Opinion and Order ("MO&O") issued by the federal bankruptcy court – was later vacated on other grounds by the United States District Court for the Northern District of Texas. *Transcom Mot.* at 2 n.2. The basis for federal district court's *vacatur* of the bankruptcy court's MO&O was Transcom's failure to pay a cure amount as a precondition to assuming a "Master Agreement" with AT&T.[62] Notably, the Transcom/AT&T Master Agreement was the subject of an earlier appeal, where Transcom sought emergency injunctive relief in the United States District Court for the Northern District of Texas, Fort Worth Division, against AT&T and SBC Communications, Inc.[63] In that case, the federal district court denied Transcom's application for injunctive relief on the ground that the forum selection clause in the Master Agreement provided

[62] *See AT&T Corp. and SBC Telcos v. Transcom Enhanced Services, LLC*, Civil Action No. 3:05-CV-1209-B, Memorandum Order, at 6 (N.D. Tex. 2006) (attached as Exhibit K).
[63] *Transcom Enhanced Services, LLC v. AT&T Corp. and SBC Comms. Inc.*, Civil Action No. 4-05-CV-075-Y (N.D. Tex. Feb. 16, 2005) (attached as Exhibit L).

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for exclusive jurisdiction over any action arising under that agreement in New York.[64] Transcom apparently elected not to appeal this decision, but instead filed for bankruptcy protection.

As indicated, the federal district court vacated the bankruptcy court's MO&O due to Transcom's failure to cure. In doing so, the federal district court did not reach the primary issue on appeal (*i.e.*, whether the federal bankruptcy court exceeded its jurisdiction in deciding that Transcom is an ESP), because to do so "would constitute nothing more than an impermissible advisory opinion."[65] It is ironic that the Transcom Defendants now seek to rely on a ruling that was vacated due to their own negligence.

In any event, it should be obvious to Transcom that the bankruptcy court's MO&O carries no precedential weight whatsoever. *See Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) (citing *O'Connor v. Donaldson*, 422 U.S. 563, 578 n.2 (1975)). For the same reason, any discussion of Transcom's regulatory status in the federal bankruptcy court's confirmation order, which was issued *after* the bankruptcy court's initial decision was vacated, was merely gratuitous. When the bankruptcy court issued its confirmation order, Transcom's regulatory status had no bearing on any issue that the federal bankruptcy court had before it. In other words, due to Transcom's failure to assume the Master Agreement with AT&T, the bankruptcy court's reiteration that Transcom was an ESP was absolute dicta, and was clearly just a recapitulation of that court's prior ruling. The bankruptcy court *should* have paid heed to the admonishment of its higher authority, the federal district court, that it lacked jurisdiction to make that determination based on the choice of forum clause in the Transcom/AT&T Master Agreement. Failing that, the bankruptcy court *should* have paid heed to the admonishment of the

[64] *Id.* at 1-2.
[65] AT&T Corp. and SBC Telcos v. Transcom Enhanced Services, LLC, supra note 62, at 6.

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federal district court that to weigh in on the ESP issue at all would be to render an impermissible advisory opinion. Consequently, the bankruptcy court's second decision is of no precedential value whatsoever on the ESP issue.

In turn, Transcom's reliance on the confirmation order in its response to Qwest's demand letter dated November 9, 2006, cannot seriously be proffered to suggest that Qwest was "aware" of Transcom's regulatory status. *See Transcom Mot.* at 3, line 5. As Qwest has previously suggested, the bankruptcy court's "determination" in that regard was impermissible for several reasons, but most importantly, it flatly contradicted the FCC's *IP-in-the-Middle Order.* The most Qwest could have been "aware" of at the time was not some binding determination as to Transcom's regulatory status – as Transcom suggests – but rather, the fact that a bankruptcy court had rendered gratuitous dicta on that issue that was flatly wrong, as a matter of substantive law.

Finally, the third decision on which Transcom relies – the bankruptcy court's Order Granting Transcom's Motion for Partial Summary Judgment, which was issued in September 2007 – was not even litigated by Global Crossing, who was the party "opposing" Transcom at that later stage of the bankruptcy proceeding. Therefore, not having been actually litigated, that decision cannot operate as any bar or estoppel to Qwest litigating this issue now.[66] To the extent that this Court takes judicial notice of the three decisions upon which Transcom improperly relies, Qwest requests that, pursuant to Rule 201 of the Federal Rules of Evidence, this Court

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[66] *See* Case No. 05-31929-HDH-11, Adversary No. 06-3477, *Transcom Enhanced Services, LLC v. Global Crossing Bandwidth, Inc.*, Response to the Motion and Memorandum for Partial Summary Judgment at 2 (Sept. 12, 2007) (attached as Exhibit M) (Global Crossing, in response to Transcom's motion for partial summary judgment on the issue of whether Transcom qualifies as an ESP, stated that it "does not take a position on the Summary Judgment Pleadings.").

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also take judicial notice of (1) the federal district court's Order denying Transcom's request for injunctive relief, (2) the federal district court's Memorandum Order vacating the bankruptcy court's MO&O, and (3) Global Crossing's Response to Transcom's Motion for Partial Summary Judgment.

B. Qwest's Claims Against the Transcom Defendants Were Not Discharged in the Bankruptcy Proceeding

Transcom also engages in a bit of misdirection with respect to the effective date of the bankruptcy court's decision. To be sure, Transcom would have this Court believe that the effective date of the bankruptcy court's confirmation order was June 16th, 2006. *See Transcom Mot.* at 9, line 5; *Birdwell Aff.* ¶ 5. But Transcom's representations about the effective date of the confirmation order are belied by its own written correspondence. For instance, in its November 9th response letter to Qwest, Transcom asserted that the effective date of the bankruptcy court's confirmation order was June 1, 2006, *not* June 16th. *See Transcom Mot.*, Exhibit E. Moreover, Transcom's Reorganization Plan defined the "effective date" as "the earliest practicable date following entry of the Order of Confirmation, but in no event more than thirty (30) days after entry of the Order of Confirmation...." *See Transcom Mot.*, Exhibit I at 64. As the date of the bankruptcy court's confirmation order was May 16, 2006, the *earliest* possible effective date of the confirmation order therefore fell on May 17th.

In any event, however, the inquiry does not end with the effective date of the confirmation order, whatever that effective date might, in fact, be. Assuming that a federal bankruptcy court even *has* the authority to discharge post-confirmation debts (a dubious proposition, to be sure), the federal bankruptcy court in the Transcom case did not include any provision for the filing of administrative expenses in its confirmation order. *See In re Zilog, Inc.*,

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450 F.3d 996, 1001 n.5 (9th Cir. 2006) (questioning whether post-confirmation debts can be discharged in bankruptcy). Under similar circumstances, the Ninth Circuit has held that the discharge of post-confirmation debt in the absence of such a savings clause would result in a "manifest injustice" to a potential claimant. *See id.* at 1001-1002. Thus, Qwest submits that, to the extent that its claims against the Transcom Defendants are controlled in any way by Transcom's bankruptcy proceedings, Qwest would, at a minimum, be entitled to recover any damages for conduct occurring after May 16, 2006, which was the confirmation date of Transcom's reorganization plan. Moreover, because Transcom readily admits that Transcom Holdings did not cease all operations until June 16, 2006, it would be inappropriate for this Court to dismiss Transcom Holdings at this time. *See Birdwell Aff.* ¶ 6.

As a matter of due process, Qwest also disagrees with the assertion that the Transcom Defendants were released from all claims prior to the effective date of the confirmation order. *See Transcom Mot.* at 9, Lines 3-12. As another federal district court has recognized, debtors should not be allowed "to use the [Bankruptcy] Code as a shield for fraudulent conduct." *In re Morgan*, 197 B.R. 892, 898 (N.D. Cal. 1996). In a similar vein, the Ninth Circuit has stated that "nothing in the legislative history of the [Bankruptcy] Code suggests that Congress intended to discharge a creditor's rights before the creditor knew or should have known that its rights existed." *In re Jensen*, 995 F.2d 925, 930 (9th Cir. 1993); *see also In re Hexcel*, 239 B.R. 564, 567 n.3 (N.D. Cal. 1999) (quoting this passage from *Jensen* in support of the proposition that any future, unknown claim that could not have been reasonably contemplated by a creditor must not be discharged through bankruptcy).

In this case, Qwest was *not* put on notice that its interests might be affected by Transcom's bankruptcy proceeding. *See In re Hexcel*, 239 B.R. at 566; 11 U.S.C. §§ 363(b),

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1128(a) & 1109(b). Qwest was not included on Transcom's list of creditors, nor did Qwest receive notice of the bankruptcy court's confirmation plan. As Qwest now knows, Transcom began misrouting traffic through ELI circuits in September 2005, and ELI continued to provide circuits to Transcom through March 2007. *See Transcom Mot.* at 3, lines 17-18. However, as the attached Ferguson affidavit demonstrates, ELI did not provide information associating some circuits to Transcom until May 22, 2006. *Fergsuon aff.* at 4, lines 8-10. ELI did not provide information associating other circuits to Transcom until September 21, 2006. *Id.*, lines 10-11.

Qwest did not have sufficient knowledge of facts that would support a legal claim against Transcom until, at the earliest, May 22, 2006 – six days *after* the issuance of the bankruptcy court's confirmation order. For traffic over certain circuits Qwest did not have sufficient knowledge of facts that would support a legal claim against Transcom until September 21, 2006. In other words, Qwest's claims were not within Qwest's "fair contemplation" until after the May 16, 2006 confirmation order, and therefore *all* of Qwest's claims fall outside the bankruptcy process. *See In re Zilog, Inc.*, 450 F.3d at 1002; *In Re Hexcel*, 239 B.R. at 570; *In re Morgan*, 197 B.R. at 898 (applying fair contemplation test to a fraud claim). At a minimum, then, Qwest's claims for damages may encompass Transcom's activities from the May 17th, 2006, through the March 2007 date on which ELI discontinued providing service to Transcom and, subject to discovery, any other conduct after that time. In addition, Qwest's claims even for traffic preceding the date of the confirmation order should also be viable under the fair contemplation test. The Court, however, need not and cannot resolve these issues now, in a motion to dismiss, because they will turn on factual and legal determinations that cannot be made at this early stage of litigation.

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XIII. RESPONSE TO DEFENDANTS' MOTION FOR A MORE DEFINITIVE STATEMENT.

Qwest has met the minimum pleading requirements of the Federal Rules obviating the need to entertain the Defendants' Rule 12(e) motion for a more definitive statement. Fed. R. Civ. P. 12(e) states that:

> A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired.

"Motions for a more definite statement are viewed with disfavor and are rarely granted because of the minimal pleading requirements of the Federal Rules. Parties are expected to use discovery, not the pleadings, to learn the specifics of the claims being asserted." *Sagan v. Apple Computer, Inc.*, 874 F.Supp. 1072, 1077 (C.D. Cal. 1994) (citations omitted). Qwest's allegations throughout the Complaint apply to each and every Defendant. Defendants strain credibility in arguing that they cannot reasonably prepare a response to Qwest's Complaint. To the contrary, Qwest has provided ample detail on the substance of the claims, and Defendants as well as Qwest will have the opportunity to learn the specifics through discovery.

XIV. CONCLUSION

For the foregoing reasons, Qwest submits that the Court should deny the Defendants various motions to dismiss, and also deny the motion to stay this lawsuit under the doctrine of primary jurisdiction.

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Dated this 13th day of April, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2009, I electronically filed the foregoing **QWEST'S CONSOLIDATED OPPOSITION BRIEF TO DEFENDANTS' MOTIONS TO DISMISS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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EXHIBIT

"A-15"

Honorable Ricardo Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION, Plaintiff, v. ANOVIAN, INC., et al., Defendants.	No. 08-CV-01715 MAT REPLY OF BROADVOX DEFENDANTS TO QWEST'S CONSOLIDATED OPPOSITION BRIEF TO DEFENDANTS' MOTIONS TO DISMISS NOTE ON MOTION CALENDAR: May 8, 2009 ORAL ARGUMENT REQUESTED

Defendants Broadvox, Inc., Broadvox, LLC and BroadvoxGo!, LLC (collectively "Broadvox" or " the Broadvox defendants") hereby Reply to Qwest's Consolidated Opposition Brief to the Defendants' Motions to Dismiss ("Qwest Opposition" or "Qwest Op."). Qwest's opposition fails to demonstrate that the Court has jurisdiction over Broadvox or the other defendants, or that it has chosen a proper forum. Accordingly, the Court should grant all Defendants' Motions in their entirety.

I. QWEST FAILS TO CARRY ITS BURDEN TO PROVE THIS COURT HAS PERSONAL JURISDICTION OVER BROADVOX

In its Opposition, Qwest claims that Broadvox has sufficient contacts with Washington to justify specific jurisdiction.[1] Qwest Opp., at p.13. The Ninth Circuit applies a

[1] Qwest does not assert that this Court has general jurisdiction, therefore Broadvox does not

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three-part test for specific jurisdiction, which requires that the nonresident defendant do some act by which he purposefully avails himself of the privilege of conducting activities in the forum, the claim must be one that arises out of the defendant's forum-related activities; and the exercise of jurisdiction must be reasonable. *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). The plaintiff has the burden of proof on the first two prongs, however Qwest fails to carry that burden as to either.

A. Broadvox Lacks Sufficient Contacts Related to Qwest's Complaint to Create Personal Jurisdiction in Washington

Broadvox demonstrated in its Motion to Dismiss that its contacts with Washington are not purposeful, and are extremely small and tenuous. In its Opposition, Qwest points to a contract between Electric Lightwave, Incorporated ("ELI"). Qwest Op., at p. 15. Broadvox LLC terminated its contract with ELI in November, 2006. Supp. Blumin Decl., at ¶12. Since then, Broadvox has contracted with a non-Washington carrier for termination of Broadvox customers' traffic in Washington. Supp. Blumin Decl., at ¶4-5. Broadvox hands off the traffic inbound for Washington state to that carrier at locations ***outside*** the state of Washington. Supp. Blumin Decl., at ¶4. After receiving traffic from Broadvox at a hand-off point outside Washington state, the carrier uses its own network facilities to transport the traffic into the state of Washington and determines, without direction from Broadvox, how to terminate the traffic. Supp. Blumin Decl., at ¶5. Any decision to terminate the traffic to Qwest is solely in the discretion of that carrier.

Broadvox is not certified as an IXC by the state of Washington or the FCC and it does not operate as an IXC in Washington. Supp. Blumin Decl., at ¶3. Broadvox has no contract

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address that issue.

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with Qwest for termination of traffic in Washington. Supp. Blumin Decl., at ¶6. Broadvox has no facilities inside the state of Washington which terminate inbound traffic. Supp. Blumin Decl., at ¶13. For all of these reasons, Broadvox has not purposely availed itself of the Washington market through these contracts.[2]

Instead, Broadvox merely provides an intermediate transport link for traffic that others direct into Washington. While Broadvox arguably could have foreseen that some of its customers' end users might direct traffic to be terminated in Washington, mere foreseeability that a non-resident could have an effect in the forum state does not by itself establish personal jurisdiction. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). Rather, the defendant's conduct and connection with the forum State must be such that he should reasonably anticipate being haled into court there. *Id.* at 297.

The facilities Broadvox provides to its customers for the transport of their end users' traffic for termination in Washington are analogous to other passive transport facilities such as trucks or boats that are chartered to transport a third party's cargo. Owners of those facilities are not subject to personal jurisdiction for effects arising from the cargo. In an unreported case from this Court, the owner of a vessel that was chartered by a third party was found to have insufficient contacts with the forum for general personal jurisdiction even though the owner received at least $2.3 million in income from activities in Washington State, and one of its four vessels was devoted to trade between Washington and Japan. *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1991 WL 535026 (W.D.Wash.).

The *Amoco* holding is consistent with decisions in other jurisdictions. The Fifth

[2] For the same reasons, Broadvox did not purposely direct any activities into Washington or toward Qwest that allegedly caused injury, the test applied to claims sounding in tort.

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Circuit has held that calls made at ports by vessels under charter do not establish purposeful availment by the vessel's owner for purposes of personal jurisdiction. *Asarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 786-787* (5th Cir. 1990). More directly analogous to Broadvox' transport service, a District Court in Texas held that the owner of a vessel that did not direct the course of the vessel is not subject to personal jurisdiction merely because his vessel was used to transport goods into the forum state. *Griner Co. v. M/V CONTI BLUE,* 1996 U.S. Dist. LEXIS 21561 *4-5 (S.D. Tex. 1996).[3]

Other than the long-terminated ELI contract, Qwest argues that the miniscule revenue Broadvox received from customers in Washington establishes personal jurisdiction over Broadvox. Qwest's argument is unconvincing. The authorities Qwest cites require more than revenue to establish personal jurisdiction and, as discussed in the next section, Broadvox' revenue does not arise from acts related to Qwest's claim. Qwest cites *Kulko v. California Superior Court*, 436 U.S. 84 (1978) even though the court rejected personal jurisdiction over the defendant. While the Court did take into account that a father derived cost savings by allowing his daughter to live with her mother in California part of the year rather than with him, the Court concluded that such financial benefit was insufficient to create personal jurisdiction over the father in California. *Id.* at p.86.[4]

Qwest turns next to a footnote from a case in this Circuit. In *Easter v. Am. W. Fin.*,

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Bancroft & Masters, Inc. v. August Nat'l Inc., 223 F.3d 1082, 1088 (9th Cir. 2000).

[3] *See* also *Sousa v. Ocean Sunflower Shipping Co. Ltd. 608 F.Supp.* 1309, 1314-1315 (1984) (no personal jurisdiction over the manufacturer of a ship even though the manufacturer had modified his normal design for the buyer so that the ship could carry steel to U.S. ports on the West Coast, including California);.*Saudi v. S/T MARINE ATLANTIC,* 159 F.Supp. 2d 469,482 (S.D. Tex. 2000) (noting that "where the non-resident defendant does not direct and control the destination of the vessel, there is no personal jurisdiction over that defendant because that defendant cannot purposely avail itself of the benefits and protections of the forum port").

[4] Qwest incorrectly cites page 96 of this opinion in its Opposition.

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381 F.3d 948, 961 n.7 (9th Cir. 2004), the court noted that the defendants received revenue, but its finding of personal jurisdiction was based on that revenue coupled with a deed of trust that the defendant held in the forum state. *Id.* Last, Qwest relies on an unreported opinion, in which this Court found personal jurisdiction over a defendant that received a very small amount of revenue from Washington. Qwest Op., at p. 18 (citing *Gordon v. Virtumundo*, No.10 CV06-0204JCC, 2006 WL 1495770, at *4 n.7 (W.D. Wash. 2006). The defendant in *Gordon*, however, had more contacts than receiving revenue; it knowingly sent mass emails to Washington residents. Gordon, at *4.

B. Qwest May Not Rely on Broadvox Contacts Unrelated to Qwest's Complaint

Under the second prong of *Panavision*, the complaint must arise from the defendant's contacts with the forum to establish jurisdiction. Qwest claims that Broadvox should be subject to jurisdiction in Washington due to a "switching center" in Seattle and a list of Washington rate centers posted on the Broadvox website. Qwest Op., at p. 16. Neither of these activities, however, is related to the traffic at issue in this complaint (*i.e.* inbound traffic terminated on Qwest's network in Washington) and therefore are not relevant to, nor sufficient, to confer personal jurisdiction over Broadvox.

Broadvox uses a location in Seattle maintained by other carriers to interconnect and collect traffic to be carried out of Washington for termination in other states. Supp. Blumin Decl., at ¶13. The technical term for such facility is a collocation location; the Broadvox website's reference to it as a "switching center" is imprecise. Supp. Blumin Decl., at ¶13. Regardless of what it is called, Broadvox's hand-off location in Seattle handles only ***outbound*** traffic, and is not used for inbound traffic that could be terminated to Qwest's network. Supp. Blumin Decl., at ¶14. Therefore the collocation site is not related to the activities about which

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Qwest complains, and cannot provide a contact from which specific jurisdiction may arise.

Similarly, Broadvox posts a list of available rate centers on its website, but this list relates only to traffic originating in Washington. Supp. Blumin Decl., at ¶15. Qwest's reliance on this list clearly shows that Qwest misapprehends the nature of Broadvox' operations. The list of rate centers is posted under a product tab labeled "Wholesale SIP Origination."[5] This list does not denote any Broadvox facility or presence in Washington. Supp. Blumin Decl., at ¶15. Rather, the list identifies locations within Washington from which Broadvox customers could obtain transport for ***outbound*** traffic originating in Washington state. Supp. Blumin Decl., at ¶15. These rate centers are not related to the activities about which Qwest complains, and therefore do not provide a contact from which personal jurisdiction may arise.

The only other contact that any of the Broadvox Defendants have with Washington are a small number of customers from whom Broadvox derives miniscule revenue. As discussed above, a small amount of revenue, without more, is not sufficient to establish personal jurisdiction even when the revenue is directly related to the claims asserted. Here, the revenue is not related to Qwest's claim.

Broadvox LLC has seven customers who contract with Broadvox LLC for wholesale transport of traffic ***outbound*** from Washington.[6] Supp. Blumin Decl., at ¶7. BroadvoxGo LLC has nine retail customers in Washington – also all for ***outbound*** traffic. Supp. Blumin Decl., at ¶ 9 To the best of Broadvox' knowledge, none of the traffic for any of these

[5] See Broadvox website at http://www.broadvox.net/SIPTransport.aspx.
[6] These are the seven customers referenced in paragraph 21 of Mr. Blumin's Affidavit submitted with Broadvox' Motion to Dismiss. Broadvox LLC does not have any retail customers in Washington.

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customers is handed off to Qwest for termination in Washington. Supp. Blumin Decl., at ¶8-9. Therefore, the contacts with these customers cannot provide a basis for personal jurisdiction because each is unrelated to the termination of traffic to Qwest's network. Further, each of the customer contracts with Broadvox LLC and BroadvoxGo was executed in Cleveland, Ohio, and each contract includes a provision selecting Ohio for choice of law and venue. Supp. Blumin Decl., at ¶10-11. To the extent that any of these customers are Washington residents, the mere existence of a contract with Broadvox is insufficient to confer specific jurisdiction over a nonresident. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985).

C. It is Not Reasonable for Broadvox to Defend Itself in Washington

The final prong of this Circuit's test for personal jurisdiction, reasonableness, need not be analyzed because Qwest has failed to carry its burden on both of the first two prongs. The factors discussed in Broadvox's motion to transfer and in its reply on that topic below further support the argument that it is not reasonable for Broadvox to defend itself in this jurisdiction, especially because Qwest may seek resolution of its complaint in other fora (e.g., the FCC or in Texas where Broadvox is based).

II. MOTION TO TRANSFER VENUE UNDER 28 U.S.C. §1404

Qwest does not dispute that this action could have been brought in Texas. Transfer turns on whether the convenience of the parties, the convenience of the witnesses, and the interest of justice support a transfer.[7] The case cited by Qwest, *Wilton v. Hallco Industries,*

[7] *Jones v. GNC Franchising, Inc.*, 211 F. 3d 495, 498-499 (9th Cir. 2000)(relevant factors to consider in determining whether to transfer a case pursuant to §1404(a) include: (1) the plaintiffs' choice of forum; (2) the extent to which there is a connection between the plaintiffs' causes of action and this forum; (3) the parties' contacts with this forum; (4) the convenience of witnesses; (5) the availability of compulsory process to compel attendance of

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Inc., 2009 WL 113735 (W.D. Wash. Jan. 15, 2009), is inapposite. In *Wilton*, the Court declined to transfer venue where an individual plaintiff filed a claim against his employer for age discrimination. The policy concerns recognized in *Wilton* simply are not present in the instant case.

Qwest maintains that there is a strong presumption in favor of the plaintiff's choice of forum (Complaint, p.24: 21-23), but even Qwest acknowledges that this presumption does not apply where plaintiff does not reside in the forum where the litigation was brought. *Wilton*, 2009 WL 113735, at *2. Qwest is a Colorado corporation, with its principal place of business in Denve. Complaint, ¶ 10. This Court, in *Wilton*, noted that in those instances where a non-resident plaintiff files suit in a forum, it generally indicates that the plaintiff is forum shopping or "making it prohibitively expensive for defendants to litigate in plaintiff's preferred forum." *Wilton*, 2009 WL 113735, at *2.

In contrast to *Wilton*, here Qwest sued 4 defendants, all of whom have significant contacts and a strong presence in Texas, and none of whom have significant contacts with Washington. Moreover, unlike the transfer sought in *Wilton*, the distance between this Court and the Northern District of Texas is great. *Cf. Wilton,* 2009 WL 113735, at *3 (noting that the typical transfer case involves great distance between the courts).

In its Opposition, Qwest states that it "effectively" has no presence in Texas and feebly tries to convince this Court that defending a suit 1500 miles away in Washington will be no less convenient for Broadvox than defending a suit in Dallas, where Defendants either have headquarters or other significant presence. Qwest Op., at p. 25, 27-28. Although Qwest

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unwilling non-party witnesses; (6) the ease of access to sources of proof; (7) the state that is most familiar with the governing law.

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attempts to downplay its relation to Texas, it has been involved in litigation in Texas, as both plaintiff and defendant, on numerous occasions.[8] Qwest is a certified IXC in Texas and provides IXC service in Texas. As recently as March 30. 2009 Qwest filed a tariff revision with the Texas Commission.[9] Given these substantial and ongoing contacts with Texas, Qwest cannot reasonably claim that it would be unexpected or burdensome for it to be brought into court there.

III. QWEST FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED OR TO SUFFICIENTLY PLEAD ITS CLAIMS

A. Joinder in Replies Filed by Co-Defendants

Pursuant to Fed. R. Civ. P. 10(c), Broadvox hereby joins in Section III.a. of the Transcom Reply relating to Qwest's claim for fraud and in Sections I through IV of the UniPoint Reply.[10]

B. Failure to State a Claim for Unjust Enrichment

Qwest admits that it provided services to ELI, not to any of the defendants directly. Similarly, Qwest fails to dispute Defendants' assertion that Plaintiff has, in fact, been compensated for any services provided. Simply stated, Plaintiff erroneously maintains that even if it has been compensated through reciprocal compensation payments for the services it provided, it is entitled to additional compensation from the defendants. Qwest has failed to allege that it provided anything of value to any of the Defendants and Qwest already has

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[8] *E.g., Qwest Corporation, et al v. VarTec Telecom Inc.*, et al, No. 3:2006cv00242 (Northern District of Texas); *Accudata, Inc. v. Qwest Corporation,* No. 4:2007cv00180 (Eastern District of Texas); *Firstcom, Inc. v. Qwest Corporation*, No. 4:2005mc00580 (Southern District of Texas).

[9] A copy of Qwest's tariff revision is attached to the Binney Suppl. Decl. as Exhibit C.

[10] These sections address, respectively, Qwest's failure to allege that defendants are IXCs, Qwest's failure to satisfy the *Twombly* pleading standard, Qwest's failure to rebut the application of the filed-rate doctrine and the primary jurisdiction of the Federal

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received "reciprocal compensation" under 47 U.S.C. 251, therefore all claims for unjust enrichment are barred.

C. Failure to State a Claim for Tortious Interference

Qwest's argument in support of its tortious interference claim is one of the most telling portions of its brief. Essentially, Qwest argues that, because the Defendants allegedly engaged in tortious conduct, they failed to pay ELI additional amounts and therefore Qwest *did not receive certain additional payments from ELI.* That this falls far short of a tortious interference claim is readily apparent—Defendants' alleged failure to pay ELI is a contractual matter between Defendants and ELI, and in no way would involve or harm Qwest. Either Qwest is contractually entitled to payment of additional amounts from ELI, or it is not, and that question would in no way involve any of the Defendants. Qwest's argument here exposes one of the fundamental flaws of the Complaint--Qwest has no relationship with any of these Defendants. None of these Defendants ever could have made any representations to Qwest because they never had a relationship with Qwest.

To state a claim for tortious interference, Qwest must allege that the interference induced or caused a breach or termination of the subject contract. *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288, 300 (1997). Here, there is no allegation that ELI breached or terminated its contract with Qwest. Nor does Qwest allege how any failure by Defendants to pay ELI undermined or modified ELI's obligations to Qwest. If a client fails to pay me, and therefore I can't pay my rent, has that client interfered with the lease agreement between me and my landlord? What if that client intentionally

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Communications Commission over the subject matter of Qwest's complaint.

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refuses to pay me? Conspires with others to avoid paying me? Clearly, these are not examples of tortious interference, and Qwest has failed to state such a claim.

D. Failure to State a Claim for Declaratory Judgment

Courts entertain actions for declaratory judgment where they: (1) "serve a useful purpose in clarifying and settling the legal relations in issue;" and (2) "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *McGraw-Edison Co. v. Preformed Line Prod. Co.*, 362 F.2d 339, 342 (9th Cir. 1966). Generally, courts refuse to hear a declaratory judgment action if it is redundant of the plaintiffs claims for relief. *See, e.g., Celador Int'l Ltd. v. Walt Disney Co.* 347 F. Supp. 2d 846 858 (C.D. Cal. 2004).

Qwest's declaratory judgment claim turns on factual question that will be resolved and completely disposed of in the substantive causes of action asserted. Moreover, Qwest does not explain how the declaratory judgment will terminate the dispute between the parties. Qwest's claim for declaratory relief is redundant, serves no useful purpose, will not terminate the dispute between the parties, and, therefore, must be dismissed.

DATED this 8th day of May2009

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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EXHIBIT

"A-16"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION,

Plaintiff,

v.

ANOVIAN, INC.; BROADVOX, INC.; BROADVOX, LLC; BROADVOXGO!, LLC; TRANSCOM HOLDINGS, INC.; TRANSCOM ENHANCED SERVICES, INC.; MASKINA COMMUNICATIONS, INC. (f/k/a TRANSCOM COMMUNICATIONS, INC.); UNIPOINT HOLDINGS, INC.; UNIPOINT ENHANCED SERVICES, INC. (d/b/a "POINT ONE"); and UNIPOINT SERVICES, INC.,

Defendants.

Civil Action 2:08-cv-01715-RSM

TRANSCOM DEFENDANTS' REPLY TO QWEST'S CONSOLIDATED OPPOSITION BRIEF TO DEFENDANTS' MOTIONS TO DISMISS

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OTHER AUTHORITIES

Defendant Transcom Enhanced Services, Inc. ("Transcom") and Defendant Transcom Holdings, Inc. ("Transcom Holdings") (collectively, the "Transcom Defendants") file this Reply to Qwest's Consolidated Opposition Brief (the "Response") to Defendants' Motions to Dismiss (the "Motion").

According to Qwest, the *Vartec* court was wrong (Response at 51), the Transcom Bankruptcy court was wrong (Response at 70), the FCC is both incompetent and apparently unaware that it already has resolved all the intercarrier compensation issues (Response at 52-53), and the FCC didn't really mean it when it said, in the AT&T Order, that it was solely addressing AT&T's specific service (AT&T Order at 9). Like Ptolemy of old, Qwest has contrived a distorted vision of the telecom universe—a Qwest-centric universe in which all those who fail to agree with Qwest are simply wrong. But the truth has a way of wriggling through distortions, and on page 33 Qwest's response accidentally lets a little light shine through.

On that page, Qwest states that "[t]he burden on the local exchange networks to originate and terminate long-distance calls is identical, irrespective of the underlying transport technology utilized to transmit the call between local exchanges." Why would Congress and the FCC then allow ESPs like Transcom to be exempt from access charges? Why would they force incumbent LECs like Qwest to suffer losses? The answer is that they do not.

In 1997, in the wake of the passage of the Telecommunications Act of 1996, the FCC took up the issue of access charge reform, and as part of that reform effort the FCC had to address concerns raised incumbent LECs (like Qwest) that information services (like Transcom) were using the ESPs exemption to avoid paying access charges, and therefore access charge revenues had declined. The FCC addressed those concerns as follows:

> 341. In the 1983 *Access Charge Reconsideration Order*, [we] decided that, although **information service providers** ("**ISPs**") may use incumbent LEC facilities **to originate and terminate interstate calls**, ISPs should not be required to pay interstate access charges. * * *
> 344. We conclude that the existing pricing structure for ISPs should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs. We think it possible that had access rates applied to ISPs over the last 14 years, the pace of development of the Internet and other services may not have been so rapid. Maintaining the existing pricing structure for these services avoids disrupting the still-evolving information services industry and advances the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."
> 345. We decide here that ISPs should not be subject to interstate access charges. **The access charge system contains non-cost-based rates and inefficient rate structures**, and this Order goes only part of the way to remove rate inefficiencies.. * * *
> 346. **We also are not convinced that the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs. ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs.**[1]

Below, Transcom replies on the specific issues, but this Court should understand that Qwest has lost nothing, and this suit is about Qwest trying to reap a windfall from companies that are building tomorrow's technologies today—the exact types of companies that the FCC and Congress have exempted from paying access charges so that they can focus their financial efforts on reducing costs and increasing efficiencies for everyone. If Qwest wins, the consumer loses.

I. MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE PERSON OF THE TRANSCOM DEFENDANTS

Qwest in its Response claims that this court has specific jurisdiction based on the Transcom Defendants' specific conduct in Washington. Response at Page 13, Line 17. Although Plaintiff accurately states the test for asserting specific jurisdiction, it fails to actually apply that test to the facts relevant to the Transcom Defendants.

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[1] First Report and Order, *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, Released May 16, 1997, at paragraphs 341-346 (emphasis in bold added, citations omitted). The full text of this order is more than 400 pages and is available in PDF format or hard copy on request.

Plaintiff bears the burden of proving the first two elements of the specific jurisdiction test—that the defendant purposefully availed itself of the forum, and that the claims arise out of or relate to those specific activities giving rise to such purposeful availment. *Schwarzenegger v. Fred Martin Motor, Co.*, 374 F. 3d 797, 802 (9th Cir. 2002). If the plaintiff fails to satisfy either of the first two prongs, personal jurisdiction is not established in the forum state. *Id.* If, however, the plaintiff satisfies both of the first two prongs, *then* the burden shifts to the defendant to present a compelling case that the exercise of jurisdiction would not be reasonable. *Id.*

First, Qwest fails to respond to or analyze the distinction between Transcom and Transcom Holdings. The Ferguson Affidavit refers variously to the "Transcom defendants" or just "Transcom" without actually explaining what specific activities are attributable to defendant Transcom as opposed to defendant Transcom Holdings. As established by the Birdwell Affidavit, Transcom Holdings acted only as a holding company for shares of Transcom, and had no activities whatsoever except for holding those shares and providing some back-office services for Transcom in Texas. Birdwell Aff., ¶ 7. Qwest does not dispute those facts. There is no specific or general jurisdiction over Transcom Holdings, that defendant must be dismissed and should be awarded its fees under RCW 4.28.185(5) for having to seek such dismissal.

With respect to Transcom, Qwest fares no better. Qwest agrees that it must show that Transcom purposefully availed itself of the privilege of conducting activities in the forum by some affirmative act or conduct and that Qwest's claim must arise out of or result from Transcom's forum-related activities. Response at Page 14, Lines 7-8, citing *Roth v. Garcia Marquez*, 942 F.2d 617, 620-21 (9th Cir. 1991).

Application of the purposeful availment analysis depends upon whether Qwest's claims arise in contract or tort. *Schwarzenegger*, 374 F.3d, at 802. Purposeful availment is most commonly used in contract actions. *Schwarzenegger*, 374 F.3d, at 802. In contrast, for claims grounded in tort, the "purposeful direction" analysis applies. *Schwarzenegger*, 374 F.3d, at 802. Qwest does not point to any conduct by the Transcom Defendants that is susceptible to the purposeful availment analysis. Here, Qwest admits it has no contract with Transcom and that its claims are grounded in tort, therefore the purposeful direction analysis applies.

Purposeful direction is evaluated under a three part "effects" test. The "effects" test requires that Transcom allegedly have (1) committed an intentional act; (2) expressly aimed at the forum state; and (3) caused harm that the defendant knows is likely to be suffered in the forum state. *Id.* at 803, citing *Calder v. Jones*, 465 U.S 783, 104 S.Ct. 1482, 79 L.Ed. 2d 804 (1984).

Generally, a defendant purposefully directs his conduct toward the forum state if the defendant's actions outside of the forum are directed at the forum. *Schwarzenegger*, 374 F.3d, at 803. The "effects" test requires "something more" than mere foreseeability. *Id.* at 805, citing *Bancroft & Masters, Inc. v. Augusta Nat'l. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). In the context of the "effects" test, "intentional act" means "an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act." *Schwarzenegger*, 374 F.3d at 806. The intentional act must be "expressly aimed" at Washington. *Id.* And, the expressly aimed intentional act must cause harm the defendant knows is likely to be suffered in the forum state. *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002).

Qwest claims that Transcom conducted business with Electric Lightwave, Inc. (ELI), a Washington resident, and that the contractual relationship between the Transcom Defendants and ELI is sufficient to establish personal jurisdiction. Response at Page 15, Lines 7-14. The flaw in Qwest's argument is that it can show no link between any of Transcom's allegedly intentional acts and the harm Qwest allegedly suffered. Essentially, Qwest argues that it was harmed by ELI's decision to route traffic over Qwest's network. E.g., Ferguson Aff., ¶¶ 2-5. However, there is no allegation (much less any facts) suggesting that Transcom had anything to do with ELI's independent decision to route that traffic over Qwest's network, as opposed to the network of any other carrier. Moreover, Qwest offers no facts to contradict the evidence that Transcom is a ***customer*** that obtains telecommunications services from others (such as ELI), rather than a carrier itself. Further, to the extent that Qwest, a Colorado corporation with its principal place of business in Colorado, suffered any harm (i.e., lost revenue), that harm was suffered in Colorado, not Washington.

The mere fortuity of defendant Transcom having purchased services from a Washington company (ELI), which company in turn utilized Qwest's network, is simply too thin a reed to support the weight of long-arm jurisdiction. Were Qwest's analysis correct, any purchaser of telecommunications services (which is to say, almost every person and business in the United States) could be haled into a foreign jurisdiction, as somewhere in the maze of contracts, lines, and switches that make up the modern communications web, there would be some attenuated contact with almost every state. However, due process demands more. Transcom, a Texas resident whose only alleged contact with Washington was the purchase of services from a

Washington resident other than Qwest, should not have to defend itself in Washington because of that single contact.

Qwest maintains that it satisfies the Ninth Circuit's "but for" test to determine whether its claims arise out of forum-related activities because, "in the absence of each of the Defendants' contacts with Washington including the use of Qwest's local exchange facilities," Qwest would have no claim. Response at Page 16, Lines 13-17. However, Qwest does not dispute that the use of Qwest's local exchange facilities was a decision made by a third party (e.g., ELI), not by the Transcom Defendants. The traffic over Qwest's network would be the same regardless of where ELI is located, and Qwest's claim would be the same even if ELI were located in Texas or some other jurisdiction. Qwest has failed to show that its claims arise out of or result from the *defendants'* alleged "forum-related" activities.

The Transcom Defendants are citizens of Texas for jurisdictional purposes, and Qwest has alleged and can prove no basis for asserting long-arm jurisdiction. Transcom should also be entitled to its attorneys fees pursuant to the long-arm statute (RCW 4.28.185(5)).

II. MOTION TO TRANSFER VENUE UNDER 28 U.S.C. §1404

Pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in the reply to Qwest's response to the Motion To Dismiss For Improper Venue, Or, In The alternative, to Transfer Venue Under 28 U.S.C. § 1404 (the "Transfer Motion"), in Section II of the reply brief filed contemporaneously herewith by the Broadvox Defendants (the "Broadvox Reply").

III. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELEIF CAN BE GRANTED

a.F AILURE TO STATE A CLAIM FOR FRAUD

Qwest asserts that it has satisfied every element of its fraud claim, however, it fails to address its inadequate pleading of these elements. Instead, Qwest maintains that the federal rules "do not require pleading *fraud* claims or other claims under a rigid technical formula or with particular 'magic words.'" Response at Page 57, Lines 3-5 (emphasis added), citing *Castillo v. Norton*, 219 F.R.D. 155, 159 (D. Ariz. 2003); *Romine v. Acxiom Corp.*, 296 F.3d 701, 710 (8th Cir. 2002).[2] Qwest's reliance on these cases, however, is grossly misplaced. Neither *Castillo*, nor *Romine* involved a fraud claim and, in both cases, the defendants moved to dismiss on the basis of Rule 8, not Rule 9(b) (upon which the Transcom Defendants rely). *Castillo v. Norton*, 219 F.R.D., at 158 (plaintiff asserted a claim under Title VII and defendant moved to dismiss on the basis of Rule 8(a)); *Romine v. Acxiom Corp.*, 296 F.3d, at 704-705 (plaintiff's claim not subject to Rule 9(b) pleading standard). Although this general standard cited by Qwest may apply to claims other than fraud, Qwest's cause of action for fraud is subject to the more stringent Rule 9(b) standard, which requires Qwest to plead fraud with particularity. Fed. R. Civ. Pro. 9(b).

The only case cited by Qwest to articulate the Rule 9(b) standard is *Lewis v. Berry*, 101 F.R.D. 706, 708 (W.D. Wash. 1984)("In this circuit, a pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations."). But since the *Lewis* decision, the Ninth Circuit has clarified that Rule 9(b) requires, at a minimum, that the claimant plead evidentiary facts such as time, place,

[2] Plaintiff cited a dissenting opinion in the *Romine* case without properly attributing the quote to the dissent.

persons, statements, and explanations of why the statements are misleading. *See, e.g., Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985); *see also Mikron Indus., Inc. v. Hurd Windows & Doors, Inc.*, 2007 WL 3033933, *1 (W.D. Wash. 2007) (defendants' counterclaims for fraud and misrepresentation did not satisfy the requirements of Rule 9(b) because they failed to specify the time, place, and identities of the parties to the alleged misrepresentations, and further, the fraud allegations were so vague and generalized that the plaintiff had insufficient detail to adequately prepare its defenses). Additionally, because Qwest alleges omission of fact as a basis of the fraud claim, Rule 9(b) requires that Qwest plead "the type of facts omitted, the place in which the omissions should have appeared, and the way in which the omitted facts made the representations misleading." *Carroll v. Fort James Corp.*, 470 F. 3d 1171, 1174 (5th Cir. 2006)..

When allegations of fraud are asserted against multiple defendants, "each [d]efendant is entitled to be informed of the specific acts that it must defend." *Vess*, at 1106. Qwest may not rely upon generalized references to acts or omissions by all of the defendants because each named defendant is entitled to notice of the circumstances surrounding the fraudulent conduct with which it is individually charged. *Id.* at 1405. Qwest's Complaint, therefore, falls short of the particularity standard because it is not specific enough to give each defendant notice of the misconduct with which it individually has been charged. Qwest's Response does not directly address its inadequate pleading with respect to the various defendants, and it fails to explain how its generalized allegations against the defendants collectively is sufficient.

Qwest attempts to conceal its vague allegations of fraud by asserting that it is subject to a relaxed standard because knowledge of the facts surrounding its fraud claim are within the

knowledge of defendants, citing *Corley v. Rosewood Care Center, Inc.*, 142 F. 3d 1041 (9th Cir. 1998); *Concha v. London*, 62 F.3d 1493 (1995); *Neubronner v. Milken*, 6 F.3d 666 (9th Cir. 1993). But the complaint must still be specific enough to give each defendant notice of the misconduct alleged to constitute the fraud. *Harris v. Alan Ritchey, Inc.*, 2006 WL 3761339, *2 (W.D. Wash. 2006); *In re: Genesis Health Ventures, Inc.*, 355 B.R. 438, 457 (Bankr. D. Del. 2006) (even where relaxed Rule 9(b) standard applied, plaintiff was required to notify defendants of the relevant time period of conduct in question and substance of alleged fraudulent communications, identify the roles of the different defendants, and make individualized allegations in order to plead its fraud allegations with sufficient specificity). In *Corley*, the relaxed pleading standard applied because the plaintiff alleged that one defendant had committed fraud against unknown third parties and the plaintiff may not have access to the facts surrounding the fraud claim as to those third parties. 142 F.3d at 1051. Here, Qwest only alleges fraud as to Qwest, not unknown third parties.

Qwest's Complaint fails to satisfy even the relaxed standard because it is not specific enough to give each defendant notice of that defendant's alleged misconduct and is void of any particular allegations of fraud. The insufficient specificity puts all of the defendants at a disadvantage because, at the present stage of the proceedings, each defendant can do no more than generally deny any wrongdoing. *See, Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1986).

Finally, Qwest asserts that it should be permitted leave to amend its Complaint. But, since Qwest claims that it has pled the facts it has, granting leave to amend would be futile.

b. FAILURE TO STATE A CLAIM FOR UNJUST ENRICHMENT

Pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in Section III(b) of the Broadvox Reply relating to Qwest's claim for unjust enrichment.

c. FAILURE TO STATE A CLAIM FOR TORTIOUS INTERFERENCE

Pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in Section III(c) of the Broadvox Reply relating to Qwest's claim for tortious interference.

d. FAILURE TO STATE A CLAIM FOR DECLARATORY JUDGMENT

Pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in Section III(d) of the Broadvox Reply relating to Qwest's claim for declaratory judgment.

e. FAILURE TO STATE A CLAIM UNDER REGULATORY LAWS

Pursuant to Fed. R. Civ. P. 10(c), the Transcom Defendants hereby join in Sections I, II and III of the reply brief filed contemporaneously herewith by the Unipoint Defendants (the "Unipoint Reply").

IV. MOTION FOR MORE DEFINITE STATEMENT

Qwest spends significant ink disparaging the three rulings of the Transcom bankruptcy court that state, very clearly, that Transcom is an enhanced service provider (ESP) and an information service provider (ISP) and therefore is an end user that is not required to pay access charges, but rather pays end user charges. But Qwest misses the point: how could the Transcom Defendants possibly commit the kind of fraud alleged in the Complaint if they have relied in good faith on three rulings that tell them Transcom is not obligated to pay access charges? Transcom's contract with ELI clearly stated that Transcom was relying on the ESP exemption—there was nothing "disguised" about it.

Article III of Transcom's confirmed plan of reorganization provides for submission of administrative claims within 30 days after the Effective Date, and no matter how you read it Qwest had plenty of time and notice to get its claims in. But for purposes of a motion for more definite statement, if Qwest wants to allege that the Transcom Defendants were committing fraud and violating their tariff obligations all the way through the bankruptcy proceeding and right under the noses of the bankruptcy court, creditors and adversaries (including SBC and AT&T) as they examined every aspect of Transcom's financial activities under a microscope, Qwest should be required to describe how the Transcom Defendants accomplished such a feat.

And if Qwest wants to allege that the other Defendants committed acts of fraud, then clearly Qwest cannot be suggesting that they accomplished such alleged fraud in the same manner as the Transcom Defendants because the other Defendants were not in bankruptcy. At a bare minimum, their alleged tactics would have to be different because their circumstances were different.

In reality, Qwest cannot allege any wrongful conduct as to any of the Defendants. Qwest is simply throwing the proverbial mud against the wall in hopes that something will stick. Even if this Court does not dismiss Qwest's claims, Qwest should be required to replead to provide a more definite statement of its claims as to each of the Defendants, and most specifically the Transcom Defendants.

Dated this 7th day of May, 2009.

Respectfully Submitted,

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/s/ Brian W. Esler

EXHIBIT

"A-17"

HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION,

Plaintiff,

vs.

ANOVIAN, INC., et al.

Defendants.

Case No. 2:08-cv-01715-RSM

UNIPOINT DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, DEFER TO THE PRIMARY JURISDICTION OF THE FCC

NOTE ON MOTION CALENDAR:

May 8, 2009

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Notwithstanding its prodigious length, Qwest's opposition brief does nothing to rebut UniPoint's arguments for dismissal or, in the event the Court does not dismiss, for deference to the primary jurisdiction of the Federal Communications Commission ("FCC"). Qwest has admitted its failure to allege facts that would show UniPoint to be an interexchange carrier ("IXC") or a common carrier at all, yet it provides the Court with only a single piece of never-cited dicta to rebut the argument that access charges therefore do not apply. Likewise, Qwest has admitted that its Complaint is fatally short on specifics, yet argues that the Court should ignore Supreme Court precedent on point or authorize burdensome discovery in the hope that Qwest will uncover enough facts to proceed with its lawsuit. Further, Qwest attempts to bypass the filed-rate doctrine by mischaracterizing its state-law claims and the contours of the doctrine itself. And, finally, Qwest repeatedly misreads the FCC's *AT&T Order* and ignores the policy issues raised by Qwest's novel theory of access liability in order to claim that referral to the FCC is unnecessary in the event the Court does not dismiss.[1]

I. Qwest Admits Its Failure to Allege that UniPoint is a Common Carrier or an IXC, and the Complaint Should Be Dismissed as a Result

A. Only Common Carriers Can Be Subject to Access-Charge Liability

More than halfway through its 75-page brief, Qwest for the first time addresses its fundamental failure to allege that UniPoint (or any other defendant) is a common carrier. *See* Qwest Opp. at 46-50. Qwest admits this failing forthrightly, *see id.* at 44 (admitting no allegation regarding "how each Defendant has represented its service to its customers"), and then follows with the extraordinary assertion that the "issue is academic" because, according to Qwest, access charges apply to common carriers and private carriers alike. *See id.* at 45-46.

[1] UniPoint also joins the other Defendants' replies in support of their motions to dismiss. With respect to the motion for transfer to the Northern District of Texas, a passing familiarity with U.S. geography should be sufficient basis to reject Qwest's suggestion that it would be just as onerous for witnesses from Austin to appear in Dallas as in Seattle. *See* Qwest Opp. at 27-28.

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Qwest blusters that this position is backed by "clear and consistent" precedent, *see id.* at 46, but then cites to just a single FCC decision—decided 22 years ago and *never* cited by the FCC since—that addressed access-charge liability in dicta. *See id.* (citing *HAP Servs., Inc. v. Sw. Bell Tel. Co.*, Mem. Op. & Order, 2 FCC Rcd. 2948 (1987)). In *HAP Services*, the FCC denied on jurisdictional grounds a complaint regarding the validity of *intrastate* access charges. *See HAP Servs.*, 2 FCC Rcd. at 2949-50 ¶¶ 10-13. The dictum on which Qwest relies addressed the possibility that interstate calls might transit the complainant's facilities, only then discussing theoretical liability for interstate access charges. *See id.* at 2950 ¶ 14.

But this aged dictum is simply not good law. While *HAP Services* has languished uncited for more than twenty years, the FCC has consistently evinced the opposite understanding: *only* common carriers can qualify as IXCs subject to access charge. For instance:

- The FCC has held the IXCs "are widely acknowledged to be types of service providers that provide telecommunications services on a *common carrier basis*." *Request for Review of the Decision of the Universal Serv. Adm'r by Va. State Dep't of Educ., Richmond, Va.*, Order, 17 FCC Rcd. 8677, 8678 ¶ 3 (2002) (emphasis added).

- In a definition that applies to IXCs, the FCC's rules state that "telecommunications carriers" shall be treated as common carriers. *See* 47 C.F.R. § 51.5.

- The FCC has described IXCs as "telecommunications service providers," and under the Communications Act, providers of telecommunications service qualify as common carriers to the extent they provide telecommunications service. *See Request for Review of the Decision of the Universal Serv. Adm'r by Joplin R8 School District, Joplin, Mo.*, Order, 15 FCC Rcd. 3677, 3678-79 ¶ 6 (1999); *see also* 47 U.S.C. § 153(44).

- The FCC rule governing access charges applies *only* to IXC providers of "interstate or foreign *telecommunications services*," 47 C.F.R. § 69.5(b) (emphasis added), and under the Communications Act, providers of telecommunications service qualify as common carriers to the extent they provide telecommunications service. *See* 47 U.S.C. § 153(44).

- The FCC has recognized that IXCs and private carriers are mutually exclusive categories of providers, meaning that a private carrier cannot qualify as an IXC. *See Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579*, Report to Congress, 13 FCC Rcd. 11,810, 11,823-24 ¶ 22 (1998) (identifying the USF contributions expected from various categories of providers).

The substantial weight of authority, in other words, confirms that only common carriers can operate as IXCs.[2] Since there is no dispute that access charges apply *only* to IXCs, Qwest's admitted failure to allege that UniPoint is a common carrier dooms its Complaint.[3]

Perhaps recognizing that a single 22-year-old piece of never-cited dictum is a very thin reed on which to rest a case, Qwest also resorts to policy arguments, arguing that the FCC's *AT&T Order* and the statutory non-discrimination provisions in the Communications Act require the imposition of access charges even on private carriers. *See* Qwest Opp. at 48-49. But this reasoning requires a complete inversion of logic. Both the *AT&T Order* and the non-discrimination requirements apply only to *common carriers*.[4] By arguing that they inform the duties applicable to non-common carriers, Qwest has teed up its Complaint for dismissal. *See Howard v. Am. Online, Inc.*, 208 F.3d 741, 752-753 (9th Cir. 2000) (claims that a non-common carrier violated duties applicable only to common carriers are subject to dismissal).[5]

B. Alleging that UniPoint "Acts" as an IXC Merely by Participating in Interexchange Communications Does Not Support a Claim for Relief

Qwest also concedes that the Complaint lacks the fundamental allegation that UniPoint is an IXC. Qwest avers instead that it is sufficient to have alleged that UniPoint "acts" as an IXC

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[2] Qwest itself is registered to operate as an IXC in Texas. *See* Pub. Util. Comm'n of Texas, Dir. of Registered IXC Providers, *avail. at* http://www.puc.state.tx.us/telecomm/directories/ixc/searchixc.cfm.

[3] To the extent the Court is tempted to follow Qwest's aging dictum, it should recognize that doing so would conflict with the established authority presented above, and it should defer to the FCC before embarking on a reinterpretation of the access charge rules. *See infra* Part IV.

[4] *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd. 7457, 7460 n.16 (2004) ("Title II of the Communications Act imposes certain requirements on *common carriers*, including requiring carriers to provide service on just, reasonable, and nondiscriminatory rates and terms.") (emphasis added) ("*AT&T Order*"); *see id.* at 7478 (noting that the *AT&T Order* "clarifies the scope of carrier access charge obligations when *interexchange carriers* provide phone-to-phone IP telephony services") (Statement of Comm'r Copps) (emphasis added).

[5] To the extent Qwest's policy arguments have any traction at all, they counsel in favor of a referral to the FCC. They go to the heart of telecommunications policy, which is precisely the reason the primary jurisdiction doctrine exists. *See infra* Part IV; UniPoint Mot. at 16-23.

by participating in an interexchange transmission stream, on the theory that any entity participating in the routing of interexchange calls is liable for access charges. *See* Qwest Opp. at 29-30. Qwest contends that "FCC precedent" supports this novel approach, *see id.* at 29, but the only authority it offers actually undermines its position. In particular, Qwest cites a D.C. Circuit case pertaining to the regulatory status of dark-fiber transmission capacity. *See id.* at 43 (citing *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994)). But *Southwestern Bell* does nothing to support the theory that "acting" like an IXC by participating in interexchange communications leads to access-charge liability. To the contrary, it reinforces UniPoint's argument, holding that the application of Title II of the Communications Act (which covers access charges among other things) "hinges upon the premise that the regulated entity is a common carrier." *Sw. Bell Tel. Co.*, 19 F.3d at 1481. In other words, Qwest's headline case underscores the decisive fact that Qwest has failed to allege that UniPoint is a common carrier.[6]

Qwest contends that UniPoint "cites no authority" for the position that "acting" like an IXC by participating in interexchange communications does not result in liability. *See* Qwest Opp. at 43. In reality, and in marked contrast to Qwest's supposed precedent, UniPoint described an array of situations in which entities that arguably "act" like IXCs are not subject to access charges. *See* UniPoint Mot. at 9 n.8. For instance, cellular phone providers "act" like IXCs by sending and receiving traffic across the interexchange network, but they are not subject to access charges, and providers that route long-distance traffic through "leaky PBXs" also "act"

[6] Qwest's other precedent is equally unavailing. It cites two decisions in which the FCC distinguished between information services offered by common carriers and telecommunications services offered by common carriers. *See* Qwest Opp. at 44 n.45 (citing *Nw. Bell Tel. Co.*, 2 FCC Rcd. 5986 (1987), and *Regulation of Prepaid Calling Card Servs.*, 21 FCC Rcd. 7290 (2006)). These decisions have no bearing on the ultimate issue here because Qwest has not alleged UniPoint to be a common carrier of any kind. Qwest also cites a D.C. Circuit case related to the common carrier status of satellite transponder services. *See* Qwest Opp. at 44 n.45 (citing *Wold Commc'ns Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984)). But that case only supports the undisputed fact that many FCC rules hinge on whether a service is provided on a common carrier basis. *See Wold Commc'ns*, 735 F.2d at 1475.

like IXCs, but they are not subject to access charges either. *See, e.g., Atlas Tel. Co. v. Okla. Corp. Comm'n,* 400 F.3d 1256, 1266 (10th Cir. 2005); *Texcom, Inc. v. Bell Atl. Corp.,* Mem. Op. & Order, 16 FCC Rcd. 21,493, 21,496 ¶ 8 (2001). There is simply no rule of law imposing access charges on an entity that "acts" like an IXC simply by participating in the transmission chain. Since Qwest alleges only that each defendant, without differentiation, "acted" like an IXC in exactly this way, its Complaint must be dismissed.

Perhaps recognizing the unstable ground on which it has staked its Complaint, Qwest contends that the sufficiency of its "acts-as-an-IXC" allegations cannot be tested on a motion to dismiss, as Qwest needs discovery to gather more information. *See* Qwest Opp. at 44-46. This is a desperate gambit, and the Court should dismiss it as such. Whether or not Qwest's claims are sufficient depends entirely on its Complaint and the governing law: Qwest claims that all entities participating in interexchange communications "act" as IXCs and are liable for access charges, while UniPoint claims that only the IXC, which by law must be a common carrier, can be liable for access charges. As Qwest alleges no facts suggesting UniPoint (or any defendant) to be a common-carrier or an IXC, UniPoint argues that no claim for access-charge liability has been stated. The Court can and should resolve this issue on a motion to dismiss and should not entertain Qwest's undisguised request for a fishing license to see what sort of claims it might be able to concoct following burdensome discovery. *See Inst. for Wildlife Prot. v. Norton,* 337 F. Supp. 2d 1223, 1226 (W.D. Wash. 2004) ("To maintain an action in federal court, an actual case or controversy must exist, and discovery may not be used to conduct a fishing expedition in hopes that some fact supporting an allegation will be uncovered.").

C. The *AT&T Order* Has No Direct Bearing on this Case Apart from Clarifying that Access Charges Apply Only to IXCs

Like the Complaint, Qwest's opposition relies heavily on the *AT&T Order. See, e.g.,*

Qwest Opp. at 33-42 (construing the *AT&T Order*, which Qwest opportunistically calls the *IP-in-the-Middle Order*). But despite referencing the decision more than 50 times in its brief, Qwest failed to rebut UniPoint's explanation that the *AT&T Order* governs this case because it confirms that access charges apply *only* to IXCs. *See* UniPoint Mot. at 12-13.

In the *AT&T Order*, the FCC drew repeatedly on the undisputed fact that AT&T offered its service as an IXC, *see AT&T Order*, 19 FCC Rcd. at 7462, 7466-70 ¶¶ 8, 15, 18, 19, and it emphasized that its decision "addresses only AT&T's specific service." *Id.* at 7465 ¶ 13. Moreover, the FCC confirmed expressly in the *Order* that access charges apply only to IXCs, *see id.* at 7470 ¶ 19 (explaining that only "the interexchange carrier is obligated to pay terminating access charges"); 7471 ¶ 23 n.92 ("access charges are to be assessed on interexchange carriers," not other entities in the transmission chain), and Commissioner Michael Copps (currently the FCC's acting chairman) explained in an accompanying statement that the *Order* "clarifies the scope of carrier access charge obligations when *interexchange carriers* provide phone-to-phone IP telephony services." *Id.* at 7478 (emphasis added). As UniPoint explained in its motion, the *AT&T Order* holds that, in multi-provider transmission chains like those alleged by Qwest here, access charges apply *only* to the IXC in the chain. *See* UniPoint Mot. at 12.[7] But, as explained above, Qwest has admitted its failure to allege factually that UniPoint is an IXC or a common carrier, and the *AT&T Order* therefore does nothing to resuscitate its Complaint.

Qwest asserts for the first time in its opposition brief that "[i]n point of fact, Defendants are common carriers." Qwest Opp. at 45. Setting aside that (1) allegations that appear only in legal briefs are immaterial to a motion to dismiss and (2) such conclusory legal labels unsupported by factual allegations are insufficient under *Twombly*, the reasoning Qwest

[7] Qwest has alleged that, with respect to the traffic at issue, non-defendant third-parties, not UniPoint, are the IXCs. *See, e.g.,* Cmplt. ¶¶ 24-28. Under the *AT&T Order*, therefore, Qwest should turn to those entities for any access charges that may be due, and its claims against UniPoint should be dismissed.

summons to bolster this allegation is completely circular. Qwest again resorts to the *AT&T Order*, arguing that (1) the FCC determined that AT&T was providing a telecommunications service, (2) only common carriers can provide such services, and (3) UniPoint must therefore be a common carrier too. *See id.* at 45 n.48. But the fact that AT&T was a common carrier in that case was undisputed there and irrelevant here.[8]

II. Qwest Argues Fatally that Supreme Court Precedent Does Not Apply and, in any Event, its Complaint Fails to Satisfy the Governing Pleading Standard

Qwest fails to rebut UniPoint's argument that the Complaint is insufficient under the governing pleading standard, contending instead that the Supreme Court's recent *Twombly* decision does not apply. *See* Qwest Opp. at 10-11 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007)); UniPoint Mot. at 13-15. Qwest argues first that *Twombly* has no application outside the antitrust context. *See* Qwest Opp. at 10. Ninth Circuit case law debunks this argument, however, and the Court should reject it. *See, e.g., Doe v. Holy See*, 557 F.3d 1066, 1074 (9th Cir. 2009) (applying *Twombly* in a sovereign immunity case related to liability for sexual abuse); *Williston Basin Interstate Pipeline Co. v. Exclusive Gas Storage Leasehold & Easement*, 524 F.3d 1090, 1092 (9th Cir. 2008) (applying *Twombly* in a condemnation suit related to leaky natural gas wells).

Qwest then argues that regardless of what the Supreme Court may have said in *Twombly*, the Ninth Circuit still adheres to the old "no set of facts" standard. *See* Qwest Opp. at 11. To support the suggestion that the Ninth Circuit defies the Supreme Court on this issue, Qwest cites a single decision addressing issues with no direct relevance to the pleading standard. *See id.* (citing *Colwell v. HHS*, 558 F.3d 1112 (9th Cir. 2009) (assessing ripeness of challenge to federal

[8] Qwest also seeks support in FCC decisions noting that wholesale and retail carriers alike can operate as common carriers. *See* Qwest Opp. at 45-46 n.48. Though correct, those decisions shed no light on whether UniPoint is a common carrier, and they do nothing to cure Qwest's failure to allege that it is.

policy guidelines and plaintiff's standing to bring suit)). In *Colwell*, the Ninth Circuit included a two-sentence recitation of the pleading standard, quoting a pre-*Twombly* decision that employed the old standard. *See Colwell*, 558 F.3d at 1121. But *Colwell* did not analyze the pleading standard at all, and the decision was based on other grounds, meaning that its approach to the governing standard is dicta at best.[9]

In any event, *Colwell* hardly undermines the core holding of *Twombly*, the Ninth Circuit precedent applying *Twombly*, *see, e.g., Holy See*, 557 F.3d at 1074; *Williston Basin*, 524 F.3d at 1092, or the Supreme Court's even more recent confirmation that it has "rejected" "the 'no set of facts' pleading standard . . . as too lenient," *see Pac. Bell Tel. Co. v. linkLine Commc'ns., Inc.*, __ U.S. __, 129 S. Ct. 1109, 1123 (2009) (citing *Twombly*, 550 U.S. at 561-63). By arguing otherwise, Qwest tacitly admits its failure to satisfy the pleading standard that actually applies.

As a substantive matter, Qwest admits many of its failures, acknowledging for instance that "Qwest has not differentiated its factual pleadings on a defendant-by-defendant basis." Qwest Opp. at 12. In a counterproductive effort to demonstrate that the Complaint alleged enough (and with enough specificity) to meet the pleading standard, Qwest resorts to using its legal brief to invite the Court to consider factual assertions not made in the Complaint. *See, e.g.,* Qwest Opp. at 12 (factual allegations related to the operations of UniPoint and Anovian). Qwest also admits that its Complaint lacks any allegations regarding various roles Defendants played in the transmission streams at issue or the relationships Defendants had with one another, *see id.* at 44-45, but *Twombly* requires at least minimal factual allegations which, if proven, could establish the IXC element necessary to an access-charge claim. To cure these defects, Qwest proposes that the Court authorize the case to proceed because "[d]iscovery will drive additional facts to

[9] It is far more likely that *Colwell* simply repeats an outdated template statement of the standard, incorporated from earlier decisions.

light" and may thus reveal the basis for a claim. *Id.* at 13. The Court should reject this request, *see Inst. for Wildlife Prot.*, 337 F. Supp. 2d at 1226, and it should dismiss the Complaint in its entirety for failing to satisfy the *Twombly* standard.

III. Qwest Fails to Rebut the Application of the Filed-Rate Doctrine

Qwest runs itself in circles in its opposition to UniPoint's filed-rate doctrine argument. Qwest first attempts to circumvent the doctrine by arguing (without a single citation to the allegations in its Complaint) that its state-law counts seek redress for "misconduct that falls *outside* the scope of the tariff." Qwest Opp. at 62. In reality, of course, Qwest's state-law claims turn entirely on the Defendants' alleged failure to pay tariffed charges, *see* Cmplt. Counts III, IV and V, and accordingly they are all barred. *See* UniPoint Mot. at 15-16; *Freedom Ring Commc'ns, LLC v. AT&T Corp.*, 229 F. Supp. 2d 67, 69-70 (D.N.H. 2002) (dismissing unjust enrichment claim based on alleged failure to pay tariffed rates). Next, Qwest argues that UniPoint deployed the filed-rate doctrine to avoid paying charges due under the tariff, *see* Qwest Opp. at 62, but that line of reasoning merely illustrates that all of Qwest's claims hinge on its filed tariffs, even if presented in the guise of state law. Finally, Qwest cites cases in which courts have interpreted and enforced the terms of tariffs—which thus have no relevance to its argument that its state-law claims relate to conduct that falls *outside* the scope of the tariff. *See, e.g., Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166 (9th Cir. 2002); *In re NOS Commc'ns.*, 495 F.3d 1052 (9th Cir. 2007).

The doctrine preempts state-law claims because the tariff itself is the conclusive and exclusive source of law for tariff disputes. *See Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1084 (9th Cir. 2006). Each of Qwest's state-law claims derives from its contention that defendants have failed to pay tariffed terminating access charges, UniPoint Mot. at 15-16, and therefore all of them must be dismissed.

IV. In the Event It Does Not Dismiss, the Court Should Defer to the Primary Jurisdiction of the FCC

The law supporting dismissal is clear, and there is no need for input from outside agencies to reach that conclusion. Allowing Qwest's claims to proceed, by contrast, would embroil the Court in intricate and unresolved communications policy questions that are currently pending before the FCC. Therefore, in the event the Court determines that outright dismissal is not warranted, the Court should defer to the FCC. *See* UniPoint Mot. at 16-23.

Qwest fails to rebut that argument. First, it returns to the *AT&T Order*, contending that the FCC resolved in that decision that access charges apply here and, accordingly, that any other pending proceedings are therefore irrelevant. *See* Qwest Opp. at 39-40. Similarly, Qwest contends that since the *AT&T Order* settled the law in this area, any policy changes from the FCC would have prospective effect only and thus do not impact the Court's analysis. *See id.* at 53. These arguments miss the mark, however, because the *AT&T Order* does not govern. As UniPoint has explained, the *AT&T Order* clarified that access charges apply *only* to IXCs. *See supra* Part I.C; UniPoint Mot. at 12-13. It did not address the obligations applicable to non-IXC, non-common-carrier providers like UniPoint. By contrast, the proceedings underway at the FCC directly address the existence and scope of these obligations, and the Court should be reluctant to take any action that may interfere with the FCC's ongoing proceedings.

Qwest tries to distinguish the VarTec Declaratory Ruling Proceeding (which the Eastern District of Missouri referred to the FCC under comparable circumstances) on the ground that the defendant's status as an IXC was an open question in that case, while Qwest has clearly alleged that the Defendants in this case "act" as IXCs. *See* Qwest Opp. at 50-51. The "acts-like-an-IXC" allegation is a fatal failing, however, and it should result in dismissal. *See supra* Part I.B.

Qwest further argues that its advocacy at the FCC is irrelevant because it addressed the

apportionment of liability among multiple carriers, while here it asserts claims against only a single provider for any particular call. *See* Qwest Opp. at 42.[10] But Qwest has clearly alleged in its Complaint that there are multiple parties involved in transmitting the calls at issue. *See, e.g.,* Cmplt. ¶ 28 (alleging that Defendants receive traffic from IXCs and hand it off to competitive local exchange carriers for termination by Qwest). The question of which party bears liability would have to be resolved for Qwest to recover here, and it remains pending before the FCC (as Qwest has admitted in its FCC advocacy), even if Qwest seeks damages only from one.[11]

Finally, Qwest argues that a primary jurisdiction referral would only result in delay. *See* Qwest Opp. at 51-52. Qwest relies on the pending VarTec proceeding, and urges the doubtful conclusion that the FCC has not resolved the proceeding because the issues are so clear. *See id.* (arguing that the FCC has not resolved the VarTec proceeding because the issues presented have already been "repeatedly" addressed). The more plausible inference is, of course, that, the VarTec proceeding remains pending because the issues it raises are unresolved and difficult. The policy issues raised equally in the VarTec matter and Qwest's novel claim for non-IXC liability in this case implicate a host of other telecommunications issues and FCC proceedings. *See* UniPoint Mot. at 18-19. A judicial decision that addresses one narrow aspect of these issues in isolation would interfere with the FCC's processes and would create a clear risk of inconsistency. The Court should therefore defer to the FCC rather than resolve these issues in the first instance on its own.

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[10] This argument illustrates Qwest's failure to plead sufficiently. *See supra* Part II. The Complaint does not reveal that Qwest seeks payment from only one defendant for any particular call (or which defendant, for that matter). Qwest's admission that this may have been its intent reinforces the need for dismissal.

[11] Qwest also complains without explanation that UniPoint's quotations from Qwest's past advocacy before the FCC (in which Qwest stated that there is no clear rule regarding which entity bears access-charge liability in multi-provider transmission chains) are "out of context." *See* Qwest Opp. at 41; UniPoint Mot. at 19-20. But UniPoint attached the cited comments to its motion, and they reveal that Qwest requested unambiguously that the FCC clarify "who is liable in multi-carrier access traffic flows." Qwest Comments at 12 (attached as Exhibit D to UniPoint's Motion).

Dated this 8th day of May 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May 2009, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Charles Breckinridge

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EXHIBIT

"A-18"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION, a Colorado corporation,

Plaintiff,

v.

ANOVIAN, INC., et al.,

Defendants.

CASE NO. C08-1715 RSM

ORDER GRANTING THE BROADVOX DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

This matter is now before the Court for consideration of defendants Broadvox, Inc., Broadvox, LLC, and BroadvoxGo!, LLC 's motion to dismiss for lack of personal jurisdiction, or in the alternative, to stay proceedings under the doctrine of primary jurisdiction or to transfer the case to the U.S. District Court for the Western District of Texas. Dkt. #48. Defendants also move to dismiss the fraud claim for lack of particularity and for a more definite statement. The Court has considered the pleadings, the memoranda of the parties, and the declarations submitted. For the reasons set forth below, the Court does not reach the issues presented in the alternative motion because the Court finds that it does not have personal jurisdiction over the defendants.

FACTUAL BACKGROUND

This matter arises out of Qwest Corporation's allegations that defendants Anovian, Broadvox, Transcom, and UniPoint failed to pay legally required charges (access charges) for their use of Qwest's

services in completing long-distance telephone calls. Qwest alleges that the defendants are liable for these charges because they "act as" interexchange carriers within the meaning of 47 C.F.R. § 69.5(b), which assesses access charges "upon all interexchange carriers that use local exchange switching facilities" in providing interstate telecommunications services.

Defendants Broadvox, Inc., Broadvox, LLC, and BroadvoxGo!, LLC (collectively, the "Broadvox Defendants") are providers involved in the telecommunications industry that participate, through the use of new Internet technology, in the routing of telephone calls, some of which originate or terminate in Washington. Broadvox, LLC routes voice communications over the internet for other communications companies, BroadvoxGo!, LLC sells this service to other businesses, and Broadvox, Inc. is only a holding company. Broadvox, LLC and BroadvoxGo!, LLC are both Delaware limited liability companies, while Broadvox, Inc. is an Ohio corporation. Through 2007, all of the Broadvox Defendants had their principal places of business and headquarters in Cleveland, Ohio. However, since that time, they have been headquartered in Dallas, Texas.

The Broadvox Defendants have never had any employees or offices in Washington, nor have they ever been licensed to do business in Washington. They have never directed any marketing into Washington, nor owned or used any real estate in Washington, nor sent any representatives to the state to negotiate contracts. Moreover, only 0.1051% of the Broadvox Defendants' 2008 purchasing was from Washington businesses, and their 2008 sales to Washington comprised only 0.4189% of their total sales. The Broadvox Defendants' total numbers throughout their existence are not much different: only 0.4154% of their purchasing and only 0.3065% of their sales have involved Washington businesses and customers. Of the nearly 800 vendors and over 7,000 customers with whom the Broadvox Defendants

have done business, only eight of those vendors and seven of those customers are located in Washington.

Qwest provides local and long-distance telephone service to customers in many states, including Washington. Generally speaking, long-distance carriers, or interexchange carriers, rely on companies like Qwest to originate or terminate long-distance calls at the consumer level. Such interexchange carriers are charged access charges for the use of Qwest's services in traditional wireline long-distance service. However, the emergence of a new Internet technology—"IP telephony"—has allowed the Broadvox Defendants and similar companies to provide communications services over the Internet, not using traditional wireline technology. The defendants do not deal directly with Qwest and instead route calls to another provider, which then routes the calls to Qwest for termination.

ANALYSIS

Personal jurisdiction may be grounded in either general jurisdiction, when a defendant is either domiciled in or conducts "substantial" or "continuous and systematic" activities in the forum state, or specific jurisdiction, derived from a defendant's individual acts with respect to the allegations of a complaint. *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998) (*citing Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414–16 (1984)). Qwest's theory of jurisdiction in this matter is one of specific not general jurisdiction. "Washington's long-arm statute establishes personal jurisdiction over a foreign party to the full extent permitted by due process." *Corbis Corp. v. Integrity Wealth Management, Inc.* Slip Copy, 2009 WL 2486163 (W.D. Wash.) (*citing Byron Nelson Co. v. Orchard Management Corp.*, 95 Wash. App. 462, 465 (1999)). The statute provides for specific personal jurisdiction over non-resident defendants for matters arising out of, among other things, the

transaction of business within the state, the commission of a tortious act within the state, or the ownership, use, or possession of any property within the state. Wash. Rev. Code § 4.28.185(a)–(c). The Due Process Clause restricts findings of personal jurisdiction to those cases in which nonresident "defendants have 'minimum contacts' with the forum state so that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" *Roth v. Garcia Marquez*, 942 F.2d 617, 620 (9th Cir. 1991) (*quoting International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

To analyze whether the "minimum contacts" requirement is met, the Ninth Circuit has established a three-part test: "(1) the nonresident defendant must have *purposefully availed* himself of the privilege of conducting activities in the forum by some affirmative act or conduct; (2) plaintiff's claim must *arise out of* or result from the defendant's forum-related activities; and (3) exercise of jurisdiction must be *reasonable*." *Id.* at 620–21.

To meet the purposeful availment requirement under the first prong of the test, "the defendant must have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state." *Id.* at 621 (*citing Sinatra v. National Enquirer*, 854 F.2d 1191, 1195 (9th Cir. 1988)). Courts distinguish between contract and tort actions in analyzing this requirement. While for suits concerning contracts, courts typically use a purposeful availment analysis, for suits grounded in tort, courts most often use a purposeful direction analysis. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2002). As this is a tort action, the Court will employ a purposeful direction analysis.

A showing of purposeful direction "usually consists of evidence of the defendant's actions outside the forum state that are directed at the forum, such as the distribution in the forum state of goods originating elsewhere." *Id.* at 803. A defendant need not have physical contacts with the forum state.

Id. Courts use a three-part "effects" test in determining whether a plaintiff has satisfied the purposeful direction element of personal jurisdiction. The "effects" test "requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Id.* (explaining the test set out in *Calder v. Jones*, 465 U.S. 783 (1984)).

The plaintiff has the burden of proving the first two prongs of the Ninth Circuit's test. However, showing that the exercise of personal jurisdiction offends traditional notions of fair play and substantial justice falls on the defendant's shoulders: "[w]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Panavision*, 141 F.3d at 1322 (*citing Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir. 1993)). If a court decides that a defendant's activities satisfy the first two prongs of the Ninth Circuit's test, it will then consider seven factors to determine the reasonableness of exercising personal jurisdiction over that defendant:

> (1) the extent of a defendant's purposeful interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Id. at 1323 (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985)). In weighing these factors, the courts find no single factor dispositive. *Id.*

Qwest has not carried its burden in satisfying the Ninth Circuit's test for personal jurisdiction. The Broadvox Defendants have had very little contact with the forum state. In fact, Qwest cannot show

that the Broadvox Defendants purposefully directed activities into Washington; the defendants have sent no employees here, have directed no marketing at potential customers in Washington, and have no facilities or operations here. While the Broadvox Defendants did at one time have a contract with a third party, Electric Lightwave, Inc., to terminate some of its traffic in Washington, the Broadvox Defendants terminated that contract in November 2006. The Broadvox Defendants do not themselves terminate traffic in Washington: if an end user "directs traffic to be terminated in Washington state, Broadvox transports the traffic and hands it off to a third party carrier for termination to the call recipient." Dkt. # 57 at ¶ 4. Now that the Broadvox Defendants no longer have a contract with Electric Lightwave, Inc., the handoff to such a third party occurs outside of Washington, and it is then up to the sole discretion of the third party to determine how to terminate the call—whether to use Qwest's services or not. It is not, then, the Broadvox Defendants' purposeful direction that leads to Qwest's involvement with terminating traffic in Washington, but instead, that of the third parties. Moreover, the fact that less than half of a percent of the Broadvox Defendants' businesses involve Washington residents lends support to the notion that the Broadvox Defendants have not purposefully directed their activities here. Even if they were intentional acts, they were not of the kind that were expressly aimed at the forum state in such a way as the defendants would expect the resultant harm.

Moreover, Qwest has not shown that it was these tenuous contacts with Washington from which its claim arose. It was not the Broadvox Defendants' contact with eight vendors and seven customers that caused the matter at issue here. Instead, it was the traffic that the Broadvox Defendants handed off originally to Electric Lightwave, Inc. and later to non-Washington-based third parties, that is at issue in this case. As it is the third party's decision to route traffic to Qwest, it would be unreasonable to link the traffic to the Broadvox Defendants in a way that would compel them to defend in Washington courts.

Even if Qwest had carried its burden with respect to the first two prongs of the test, it would be unreasonable to find personal jurisdiction over the Broadvox Defendants. First, another, more suitable forum exists in which to bring this suit: Texas. Judicial efficiency would be maximized by bringing the suit in a location that would reduce the burden on all defendants. And, particularly in an industry such as telecommunications, where traffic is routed to many different companies as it passes from callers to recipients around the world, it would offend traditional notions of fair play and substantial justice to hale into court defendants whose purposeful interjection into the forum state consists of such meager contacts as those of the Broadvox Defendants.

Plaintiff has requested a period of jurisdictional discovery. However, there is no need for discovery in this matter, as the facts related to personal jurisdiction have been sufficiently established.

CONCLUSION

The Court has found neither that the Broadvox Defendants purposefully directed their activities at Washington, nor a cause of action arising out of Broadvox's activities in Washington, nor that exercise of jurisdiction over the Broadvox Defendants would be reasonable. Therefore, the Court concludes that it does not have personal jurisdiction over the Broadvox Defendants. Accordingly, defendants' Rule 12(b)(2) motion to dismiss (Dkt. #48) is GRANTED, and this action is DISMISSED for lack of jurisdiction. The Clerk shall enter judgment accordingly.

DATED this 16th day of December, 2009.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

EXHIBIT

"A-19"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION, a Colorado corporation,

Plaintiff,

v.

ANOVIAN, INC., et al.,

Defendants.

CASE NO. C08-1715 RSM

ORDER GRANTING DEFENDANT TRANSCOM'S MOTION TO DISMISS FOR LACK OF JURISDICTION

This matter is now before the Court for consideration of defendant Transcom's Rule 12 (b)(2), (3), and (6) motion to dismiss. Dkt. # 47. The motion asserts numerous bases for dismissal: lack of personal jurisdiction; improper venue, or in the alternative, to transfer venue; and failure to state a claim upon which relief can be granted. Defendant also moves, in the alternative, for a definite statement pursuant to Rule 12(e). The Court has considered the pleadings, the memoranda of the parties, and the declarations submitted. For the reasons set forth below, the Court does not reach all of the issues presented because the Court finds that it does not have personal jurisdiction over the defendant.

FACTUAL BACKGROUND

This matter arises out of Qwest Corporation's allegations that defendants Anovian, Broadvox, Transcom, and UniPoint failed to pay legally required charges (access charges) for their use of Qwest's services in completing long-distance telephone calls. Qwest alleges that the defendants are liable for these charges because they "act as" interexchange carriers within the meaning of 47 C.F.R. § 69.5(b),

which assesses access charges "upon all interexchange carriers that use local exchange switching facilities" in providing interstate telecommunications services.

Defendants Transcom Holdings, Inc. ("Transcom Holdings") and Transcom Enhanced Services, Inc. ("Transcom Enhanced Services") (collectively, "Transcom") are providers involved in the telecommunications industry that participate, through the use of new Internet technology, in the routing of telephone calls, some of which originate or terminate in Washington. Prior to June 16, 2006, Transcom Enhanced Services was a Texas company in which Transcom Holdings owned a minority of the equity. However, Transcom Enhanced Services filed for protection under Chapter 11 of the Bankruptcy Code in February 2005, and its reorganization plan went into effect on June 16, 2006. In accordance with the plan, all equity interests that Transcom Holdings held in Transcom Enhanced Services were canceled. Thus, since June 16, 2006, Transcom Holdings has existed as only a shell, with no actual activities. Even prior to that date, Transcom Holdings' only activities other than owning equity were providing some back-office services for subsidiaries and affiliates. All of Transcom Holdings' activities took place in Texas.

Transcom has its principal place of business and its corporate office in Dallas-Fort Worth, Texas. Neither Transcom Enhanced Services nor Transcom Holdings has ever had any offices, employees, property, or operations in Washington. Neither is registered to do business in Washington, neither has a registered agent for service of process here, and neither has had any contractual relationships with entities located in Washington since the filing date of the Complaint.

Qwest provides local and long-distance telephone service to customers in many states, including Washington. Generally speaking, long-distance carriers, or interexchange carriers, rely on companies like Qwest to originate or terminate long-distance calls at the consumer level. Such interexchange

carriers are charged access charges for the use of Qwest's services in traditional wireline long-distance service. However, the emergence of a new Internet technology—"IP telephony"—has allowed Transcom and similar companies to provide communications services over the Internet, not using traditional wireline technology. The defendant does not deal directly with Qwest and instead routes calls to another provider, which then routes the calls to Qwest for termination.

ANALYSIS

Personal jurisdiction may be grounded in either general jurisdiction, when a defendant is either domiciled in or conducts "substantial" or "continuous and systematic" activities in the forum state, or specific jurisdiction, derived from a defendant's individual acts with respect to the allegations of a complaint. *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998) (*citing Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414–16 (1984)). Qwest's theory of jurisdiction in this matter is one of specific not general jurisdiction. "Washington's long-arm statute establishes personal jurisdiction over a foreign party to the full extent permitted by due process." *Corbis Corp. v. Integrity Wealth Management, Inc.* Slip Copy, 2009 WL 2486163 (W.D. Wash.) (*citing Byron Nelson Co. v. Orchard Management Corp.*, 95 Wash. App. 462, 465 (1999)). The statute provides for specific personal jurisdiction over non-resident defendants for matters arising out of, among other things, the transaction of business within the state, the commission of a tortious act within the state, or the ownership, use, or possession of any property within the state. Wash. Rev. Code § 4.28.185(a)–(c). The Due Process Clause restricts findings of personal jurisdiction to those cases in which nonresident "defendants have 'minimum contacts' with the forum state so that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" *Roth v. Garcia Marquez*, 942 F.2d 617, 620 (9th Cir. 1991) (*quoting International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

To analyze whether the "minimum contacts" requirement is met, the Ninth Circuit has established a three-part test: "(1) the nonresident defendant must have *purposefully availed* himself of the privilege of conducting activities in the forum by some affirmative act or conduct; (2) plaintiff's claim must *arise out of* or result from the defendant's forum-related activities; and (3) exercise of jurisdiction must be *reasonable*." *Id.* at 620–21.

To meet the purposeful availment requirement under the first prong of the test, "the defendant must have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state." *Id.* at 621 (*citing Sinatra v. National Enquirer*, 854 F.2d 1191, 1195 (9th Cir. 1988)). Courts distinguish between contract and tort actions in analyzing this requirement. While for suits concerning contracts, courts typically use a purposeful availment analysis, for suits grounded in tort, courts most often use a purposeful direction analysis. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2002). As this is a tort action, the Court will employ a purposeful direction analysis.

A showing of purposeful direction "usually consists of evidence of the defendant's actions outside the forum state that are directed at the forum, such as the distribution in the forum state of goods originating elsewhere." *Id.* at 803. A defendant need not have physical contacts with the forum state. *Id.* Courts use a three-part "effects" test in determining whether a plaintiff has satisfied the purposeful direction element of personal jurisdiction. The "effects" test "requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Id.* (explaining the test set out in *Calder v. Jones*, 465 U.S. 783 (1984)).

The plaintiff has the burden of proving the first two prongs of the Ninth Circuit's test. However, showing that the exercise of personal jurisdiction offends traditional notions of fair play and substantial justice falls on the defendant's shoulders: "[w]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Panavision*, 141 F.3d at 1322 (*citing Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir. 1993)). If a court decides that a defendant's activities satisfy the first two prongs of the Ninth Circuit's test, it will then consider seven factors to determine the reasonableness of exercising personal jurisdiction over that defendant:

> (1) the extent of a defendant's purposeful interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Id. at 1323 (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985)). In weighing these factors, the courts find no single factor dispositive. *Id.*

Qwest has not met its burden to show that Transcom has purposefully directed activities at Washington. Under the effects test, even if it were true that Transcom committed an intentional act in allowing certain telephone calls that originated or terminated in Washington to pass through Transcom's system, the acts must still be expressly aimed at Washington and must cause harm that Transcom knew was likely to be suffered in Washington.

Documents filed by defendant Transcom demonstrate that Transcom merely performs a service for calls that are routed over Qwest's network by a third party, Electric Lightwave, Inc. Transcom does

not itself make the decision regarding where calls will originate or terminate, and the circuits over which the calls are routed to Qwest are operated by Electric Lightwave, Inc., not Transcom. Moreover, it was Electric Lightwave, Inc.'s independent decision to route the traffic in question over Qwest's network, as opposed to that of another carrier. Even if Transcom's business with Electric Lightwave, Inc. were to constitute express acts aimed at Washington, it is unlikely that Transcom was aware that any resulting harm was likely to be suffered in Washington, particularly considering the fact that Qwest is based in Colorado, not Washington.

Further, even if Transcom had purposefully directed activities at Washington, and even if Transcom's purchase of services from Electric Lightwave, Inc.—a Washington-based company—was the act from which Qwest's claim arose, the reasonableness prong of the personal jurisdiction test is still not met. The *Schwarzenegger* case makes it clear that physical contact with Washington is not a prerequisite to a finding of personal jurisdiction. However, it is relevant to an assessment of the reasonableness factor of minimum contacts with a forum state. Analysis of the seven factors that the courts consider in assessing reasonableness reveals what would be a difficult burden on Transcom if it was forced to defend this case here.

First, an alternative forum for the case exists: Texas. Even without regard for the other defendants, whose principal places of business are also in Texas, all of Transcom's operations, records, and employees are located in Texas. Jurisdiction there would thus be proper and would promote judicial efficiency. Moreover, because Transcom operates in Texas and not in Washington, its burden would be high if it was forced to defend the case in Washington. Transcom has no ties to Washington other than its decision to purchase services from a company that used Washington-based circuits to route a portion

of its traffic to Qwest. All of the defendant's operations are based in Texas, and none are based in Washington.

If Transcom's contacts with Washington were significantly stronger, it might warrant causing the defendant to incur substantial costs for travel and employee time. However, even if the Court could find that Transcom purposefully directed business at the state of Washington, the extent of its purposeful interjection was very limited. Transcom's industry is one of complex communications, transferred through various technologies by multiple intermediaries in different locations as calls move from caller to recipient. It would offend "traditional notions of fair play and substantial justice" to require Transcom to defend itself in any given forum around the world in which it has so few business ties and no physical presence.

CONCLUSION

The Court has found neither that Transcom purposefully directed its activities at Washington, nor a cause of action arising out of Transcom's activities in Washington, such that exercise of jurisdiction over Transcom would be reasonable. Therefore, the Court concludes that it does not have personal jurisdiction over Transcom. Accordingly, defendant's Rule 12(b)(2) motion to dismiss is GRANTED, and this action is DISMISSED for lack of jurisdiction. The Clerk shall enter judgment accordingly.

DATED this 16th day of December, 2009.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

EXHIBIT

"A-20"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION, a Colorado corporation,

Plaintiff,

v.

ANOVIAN, INC., et al.,

Defendants.

CASE NO. C08-1715 RSM

ORDER GRANTING DEFENDANT UNIPOINT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, WITH LEAVE TO AMEND

This matter is now before the Court for consideration of defendant UniPoint's motion to dismiss for failure to state a claim upon which relief can be granted or, in the alternative, to defer to the primary jurisdiction of the Federal Communications Commission. The Court has considered the pleadings, the memoranda of the parties, and the declarations submitted, and heard oral argument on both issues on October 28, 2009. For the reasons set forth below, the Court does not reach the issue presented in the alternative because the Court finds that the plaintiff has failed to state a claim upon which relief can be granted.

FACTUAL BACKGROUND

This matter arises out of Qwest Corporation's allegations that defendants Anovian, Broadvox, Transcom, and UniPoint failed to pay legally required charges (access charges) for their use of Qwest's services in completing long-distance telephone calls. Like the other defendants, UniPoint Holdings,

Inc., UniPoint Enhanced Services, Inc., and UniPoint Services, Inc. (collectively, "UniPoint") are providers involved in the telecommunications industry that participate, through the use of new Internet technology, in the routing of telephone calls, some of which originate or terminate in Washington. Qwest alleges that the defendants are liable for these charges because they "act as" interexchange carriers within the meaning of 47 C.F.R. § 69.5(b), which assesses access charges "upon all interexchange carriers that use local exchange switching facilities" in providing interstate telecommunications services.

To determine the sufficiency of Qwest's claim for nonpayment of access charges, it is first necessary to briefly outline UniPoint's role in the complex field of telecommunications. With regard to traditional, wireline communications, two types of providers offer service. First, as the defendant explains, the providers to which consumers typically refer as local telephone companies, "local exchange carriers ('LECs') like Qwest, transport calls within local exchanges and provide 'access' to the end-user customers on either end of the call." Dkt. # 44 at 4 (*citing Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1071 n.2 (8th Cir. 1997)). Second, the providers to which consumers typically refer as long-distance telephone companies are known as interexchange carriers ("IXCs"), which "transport calls between local exchanges, and they rely on the LECs at either end for access to consumers." *Id.* (*citing Iowa Network Servs. v. Qwest Corp.*, 363 F.3d 683, 688 (8th Cir. 2004)).

However, while these two types of providers offer service for what is deemed the more traditional, wireline communications, a new communications technology—"IP telephony"—has changed the way telephone service is provided. Instead of using solely the traditional public switched telephone network ("PSTN"), services such as defendant UniPoint are now using IP technology to provide communications over the Internet. Qwest and other incumbent LECs receive access charge payments under federal law when they originate or terminate traditional PSTN long-distance calls for IXCs, but federal law does not extend access-charge liability to non-IXCs. *See* 47 U.S.C. § 251(b)(5). According to the regulations, "[c]arrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or

foreign telecommunications services." 47 C.F.R. § 69.5(b).

UniPoint does not deal directly with Qwest but instead routes calls to another provider, which then routes the calls to Qwest for termination. Qwest claims primarily that UniPoint "acts as" an interexchange carrier, despite the fact that it does not use the traditional wireline service. Qwest asserts that the defendant has failed to pay Qwest legally required access charges in fraudulently routing this traffic through local, and not long-distance, facilities.

ANALYSIS

The recent Supreme Court decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), affirmed the current law on the requirements of stating a valid claim under Federal Rule of Civil Procedure 8(a)(2), as previously set out in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007). Federal Rule of Civil Procedure 8(a)(2) states that a plaintiff must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." As the *Iqbal* Court interpreted *Twombly*, "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." 129 S.Ct. at 1949 (*citing Twombly*, 550 U.S. at 555). Specifically, to "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (*quoting Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* According to the *Iqbal* Court, two basic principles underlie its decision in *Twombly*. First, legal conclusions are not entitled to the typical assumption of truth: "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* Second, a complaint must state a plausible claim for relief to survive a motion to dismiss, as determined by a court's experience and common sense. *Id.*

The Federal Rules' pleading requirements are admittedly minimal. However, while the plaintiff is not required to plead with detailed specificity in regards to each claim, it must still assert a legal claim for which relief may be granted—a claim for relief that is based on more than legal conclusions and that is facially plausible. Here, Qwest has failed to plead a critical element of its claim against UniPoint; nowhere did Qwest assert that UniPoint is an IXC. Qwest states only that because the defendants "participate in the provision of Telephone Toll Service with regard to the calls at issue in this Complaint, each and every Defendant *acts as* an interexchange carrier with regard to these calls." Dkt. # 1 at ¶ 18 (emphasis added). The language of 47 C.F.R. § 69.5(b) does not state that it imposes access-charge liability on those who merely "act as" IXCs. The text of the regulation itself states that carrier's carrier charges, also referred to as access charges, "shall be computed and assessed *upon all interexchange carriers* that use local exchange switching facilities for the provision of interstate or foreign telecommunications services" (emphasis added).

Thus, as currently pled, the Complaint fails to assert an essential element of the claim: that UniPoint is an IXC and therefore owes Qwest access charges. Even in reading the facts in the light most favorable to the plaintiff, in the absence of this critical allegation, Qwest has not stated a plausible claim for relief. The statement that the defendants "act as" IXCs and thus owe access charges is an unsupported legal conclusion. And, as the *Iqbal* Court made clear, legal conclusions do not merit an assumption of truth or create a legally cognizable claim absent other factual evidence.

UniPoint's alleged failure to pay access charges is at the heart of all of Qwest's federal and state claims. Because Qwest has failed in asserting that UniPoint is an IXC, it has thereby failed in stating any claim upon which relief can be granted and does not survive a motion for dismissal under Federal Rule of Civil Procedure 12(b)(6).

CONCLUSION

The Court has found that Qwest has not stated a claim upon which relief can be granted. Accordingly, the defendant's Rule 12(b)(6) motion to dismiss is GRANTED, and the Complaint is DISMISSED, with leave to amend. The plaintiff shall have thirty days to file an Amended Complaint. If no Amended Complaint is filed, the action shall be dismissed without prejudice.

DATED this 15 day of December 2009.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

EXHIBIT

"A-21"

United States District Court

WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION,

Plaintiff,

v.

ANOVIAN, INC., et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C08-1715RSM

__ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court**. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT;

The Defendant's motion to Dismiss for lack of personal jurisdiction was GRANTED as to Defendant Transcom and Defendant Broadvox in the Court's Order dated December 16 2009. (Dkt.#s 67,68). Judgment is entered as to those Defendants

Dated this 20th day of January 2010.

BRUCE RIFKIN
Clerk

/s/ Rhonda Stiles
Deputy Clerk

EXHIBIT

"A-22"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

QWEST CORPORATION, Plaintiff - Appellant, v. BROADVOX INC; et al., Defendants - Appellees.	No. 10-35177 D.C. No. 2:08-cv-01715-RSM Western District of Washington, Seattle ORDER

Pursuant to the court's August 9, 2010, order, this appeal is deemed dismissed voluntarily. Fed. R. App. P. 42(b).

This order served on the district court shall act as and for the mandate of this court.

FOR THE COURT:

By: Chris Goelz
Circuit Mediator

8/18/10/cg/mediation

EXHIBIT

"A-23"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QWEST CORPORATION, Plaintiff, v. ANOVIAN, INC., et al., Defendant.	CASE NO. C08-1715 RSM AMENDED DISMISSAL ORDER

The Court having been notified of the settlement of this case, and it appearing that no issue remains for the court's determination,

IT IS ORDERED that this action and all claims asserted herein are DISMISSED without prejudice and without costs to any party.

In the event that the settlement if not perfected, any party may move to reopen the case, provided that such motion is filed within thirty (30) days of the date of this order.

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Dated this 10th day of September 2010.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE